



# Health Care Policy and Constitutional Rights

## The Health Care Freedom Amendment

BY DAVE ROLAND

**Ed. Note:** *This report is excerpted from excellent testimony by constitutional attorney Dave Roland on Alaska House Joint Resolution 35, which was heard before the Alaska House Finance Committee on April 10, 2010. Although HJR 35 failed to pass the Alaska House and died with session's end, the bill's sponsors say they'll reintroduce the legislation in the 2011 session.*

Co-Chairperson Hawker, Co-Chairperson Stoltze, Vice-Chairperson Thomas, and members of the committee, I thank you for the opportunity to offer this testimony. My name is Dave Roland, and I am a policy analyst for the Show-Me Institute, a non-profit, non-partisan, Missouri-based think tank that supports free-market solutions to the state's social challenges. Prior to joining the Show-Me Institute, I spent several years in Washington, D.C., gaining expertise in constitutional law as a litigator with the Institute for Justice, a public-interest law firm that specializes in the protec-

tion of Americans' liberties. The ideas I will offer today are my own, and should not be taken as necessarily representative of the organizations with which I am affiliated.

Among the elements of the new health care reform law that was passed by Congress is a requirement that almost every adult would either have to purchase a health insurance policy or face punitive fines to be collected by the Internal Revenue Service.<sup>1</sup> There has been widespread debate in legal circles about whether the courts would uphold such a requirement, but lawmakers in at least 40 states are trying to do what



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they can to insulate their citizens from such a requirement. In Alaska, members of this legislature are considering

<sup>1</sup> The law makes exceptions for members of religious groups whose beliefs forbid the acceptance of modern medical treatments.

HJR 35, which very closely resembles the legislation known in other states as “Health Care Freedom” amendments. HJR 35, if passed by this legislature, would offer citizens the opportunity to modify the Alaska Constitution to formally recognize their right to decide for themselves whether they will participate in any private health care system. Under this amendment, the government would not be permitted to prevent citizens from offering or accepting direct payment for health care services, and neither could it substantially limit the purchase or sale of health insurance in private health care systems.<sup>2</sup>

## While many Americans currently carry health insurance policies that would not fit the requirement Congress is considering, there are also many who have reasons for choosing to remain uninsured.

My testimony today is not intended as an endorsement of any legislation, but rather to explain the policies implicated by the state bill and the federal law just mentioned. I will particularly address the constitutional issues raised by one element of the federal health care reform law, the way that courts would likely resolve those constitutional issues, and the likely impact of the Health Care Freedom Amendment on the courts’ resolution.

### Should Everyone Have Health Insurance?

The linchpin of the new federal health care reform law is a requirement that by 2014 almost every adult in the nation must obtain a health insurance pol-

icy that would meet certain requirements imposed by Congress. In addition to the fact that many Americans currently carry health insurance policies that would *not* fit the requirements Congress is considering, there are also many who have reasons for choosing to remain uninsured. A brief look at the basic mechanics of the health insurance industry will help illustrate why some people make these choices.

Insurance is gambling, both for the insurers and the insured. The insurer looks at your profile and makes a careful statistical determination of how much your health care is likely to cost

them over a given period of time. They then charge you a premium that—if their calculations are correct—would allow them not only to cover your expenses, but also to pay their employees and to make a profit on top of that. Their risk lies in the possibility that you might incur costs greater than they expect and/or sooner rather than later. But the odds are heavily stacked in their favor. These companies are very good at making their guesses, and the large pool of resources that results from their customer base means that, just like a casino, they almost always come out ahead.

For the insured, there is also a gamble involved. If, in fact, the insurance companies are correct (as they usually are),

the insured will end up paying far more for their health care than they would have if they had remained uninsured. This is the risk they assume in order to gain peace of mind that, should a catastrophic injury or illness occur sooner rather than later, they will be taken care of. But, financially speaking, the great majority of people would be better off putting 85 percent of what their insurance premium would have been into a savings account earmarked for health care expenses.<sup>3</sup> Then, whenever health care costs emerge, the money is ready to be used—and, importantly, it can be used for any procedure and any health care provider the insured prefers.<sup>4</sup>

So the health insurance trade off is, the insured sacrifices extra money and a significant range of choice as to providers and procedures for the assurance that they will have their expenses covered if they should need treatment sooner than they would otherwise be able to pay for it. It is not a necessity, and a large majority of people would ultimately be better off if they simply saved their money instead of giving it to insurance companies. That is why it very easily could make economic sense to forgo health insurance.

While some people may not carry health insurance because it is unaffordable, many Americans choose not to purchase health insurance. Some people’s religions may not permit the use of modern medicine, while others may not believe it to be effective. Still others are simply confident enough in their propensity for health that they are willing to risk the costs of illness or injury in order to direct their money to concerns that they believe to be more pressing for themselves and their fam-

2 It appears from the current text of the Health Care Freedom Amendment that the legislature would retain the ability to pass a comprehensive, tax-based, single-payer public health insurance system, so long as in doing so it did not either outlaw the sale or purchase of private insurance policies or restrict citizens’ abilities to offer or accept direct payment for health care services.

3 Even the best of health insurance companies usually only apply about 85 percent of the premiums they receive on their clients’ health care costs.

4 Most health insurance companies place limits on the doctors from whom a policy holder can receive treatment as well as on the types of treatment that are covered.

ilies. And there are some who, recognizing that most people pay far more to insurance companies than they are ever likely to need for their own treatment costs, would prefer to self-insure by creating their own health fund. For each of these people, a congressional directive to purchase a health insurance policy would mean giving up a huge amount of money—as well as a significant amount of autonomy and privacy—committing themselves to a contract for goods and services that they do not want, and in some cases may be prohibited from using.

### The Federal Constitution

As we all remember from high school, congressional authority is limited to those powers explicitly granted by the Constitution.<sup>5</sup> In this case, the question would be whether the Constitution gives Congress the authority to punish citizens for refusing to purchase health insurance.

Those arguing in favor of the law's constitutionality suggest that this authority is part of part of Congress' power "to regulate commerce ... among the several states[.]"<sup>6</sup> It is true that since 1937 courts have generally interpreted this power very broadly,<sup>7</sup> resulting in

a U.S. Supreme Court decision that a farmer named *Filburn* was bound by agricultural regulations regardless of whether he took his grain to market.<sup>8</sup> More recently, the Supreme Court also held that *Angel Raich* was subject to federal drug laws even though her medical marijuana was homegrown and neither bought nor sold.<sup>9</sup>

But courts have also recognized that congressional authority under the Commerce Clause is limited. In *U.S. v. Lopez*, the Supreme Court held that the Commerce Clause did not permit Congress to create a federal law banning possession of firearms in a school zone.<sup>10</sup> In *U.S. v. Morrison*, the court struck down a law that addressed the subject of gender-based violent crime.<sup>11</sup> The primary reason that the court struck down the laws in *Lopez* and *Morrison* was that the subjects Congress sought to regulate lacked a clear nexus with commerce among the states.

Even though much of the health insurance industry is handled within the bounds of individual states,<sup>12</sup> courts will likely find that health insurance as a whole is an issue with a sufficient connection to interstate commerce to permit congressional regulation. But now that Congress has passed a law man-

dating that individuals must either buy health insurance or face financial sanctions, courts will still have to answer a very specific question: Does the power to regulate interstate commerce give Congress the authority to penalize citizens *who do not wish to engage in commerce*?

As Prof. Randy Barnett pointed out at a Heritage Foundation debate,<sup>13</sup> the Supreme Court has never faced such a question, so we cannot be certain of its answer. I tend to agree with Barnett that the Court's response will likely hinge on the solicitor general's ability to explain which aspects of citizens' lives (if any) would remain beyond the reach of congressional regulation if the Court permitted these mandates to be enforced. If the Solicitor General offers a reasonable response that acknowledges clear limits to the powers available under the Commerce Clause, the Court may sustain the individual health insurance mandate. If not, I believe that the majority of justices will strike the mandate as unconstitutional.

Some professors have argued that even without relying on the Commerce Clause, authority for the health insurance mandate could be found in Congress' power "to lay and collect taxes ...

5 These eighteen powers are enumerated in Article I, section 8, of the U.S. Constitution: 1) To tax and spend for "the common defense and general welfare of the United States"; 2) To borrow money; 3) To regulate commerce with foreign nations and among the several states; 4) To establish rules governing naturalization of citizens and bankruptcies; 5) To coin money and regulate its value; 6) To punish counterfeiting; 7) To establish a postal service and post roads; 8) To establish copyright laws; 9) To constitute a federal court system inferior to the Supreme Court; 10) To punish piracies on the high seas and offenses against the law of nations; 11) To declare war and make rules concerning captures on land and water; 12) to raise and support armies; 13) To provide a navy; 14) To make rules to govern the army and navy; 15) To provide for the use of militia to enforce laws, suppress insurrections, and repel invasions; 16) To provide for organizing, arming, and disciplining the militia; 17) To govern the District of Columbia; and 18) to make laws "necessary and proper for carrying into execution the foregoing powers."

6 U.S. Const. Art. I, § 8.

7 Prior to 1937, the power of the federal government was regularly held in check by the Supreme Court. A number of factors, including President Franklin Roosevelt's threat to pack the court with his own appointments in order to ram through New Deal legislation, led to what has been termed a "constitutional revolution". For the past 73 years, the general rule has been for courts to presume that the Commerce Clause grants Congress nearly unlimited authority to regulate the behavior of citizens—particularly as pertains to their ability to obtain, keep, and use property.

8 *Wickard v. Filburn*, 317 U.S. 111 (1942).

9 *Gonzalez v. Raich*, 545 U.S. 1 (2005).

10 *U.S. v. Lopez*, 514 U.S. 549 (1995) (finding no clear connection between mere possession of a firearm in some proximity to a school and the stream of interstate commerce).

11 *U.S. v. Morrison*, 529 U.S. 598 (2000).

12 In part as a result of federal law, it is very unusual for individuals to be able to purchase insurance from companies outside the state in which they are currently domiciled.

13 Video available at <http://volokh.com/2009/12/09/video-of-heritage-session-on-constitutionality-of-health-care-mandate/>.

[to] provide for the ... general welfare of the United States,”<sup>14</sup> or even in the 16th Amendment’s authorization of an income tax.<sup>15</sup> I disagree. While the taxation power *might* permit Congress to create a tax-based, universal public health insurance system like Medicare,<sup>16</sup> this sort of comprehensive, tax-based program is not the object of the penalties that would be assessed upon those who choose not to comply with the insurance mandate. In fact, these penalties cannot properly be considered “taxes” at all unless their primary purpose is to raise revenue for the government rather than to regulate the behavior of citizens.<sup>17</sup> Thus, while Congress can properly impose fines for violation of a law that it is permitted to enforce pursuant to its authority to regulate commerce, it may not call a fine a “tax” in order to justify penalties for behavior *not* within its authority to regulate commerce. Furthermore, even if the fees for failing to purchase health insurance were classified as a tax authorized by Article I, section 8, Congress is specifically denied

the authority to impose capitation taxes “unless in proportion to the census,” a requirement that the current proposal does not seem to meet.<sup>18</sup> Therefore, Congress may not justify the mandate and its penalties unless they are enacted pursuant to one of the other powers enumerated in Article I, section 8.

The next question courts would have to answer is whether the issue should be reserved to the states under the 10th Amendment.<sup>19</sup> This is shakier ground for a constitutional defense than one would really like to have. While the original intent of the 10th Amendment was clearly to keep the federal government in its proper, limited sphere, the test of the amendment states that it applies only where courts have determined that a specific power has not been delegated to Congress. If a court has already located congressional authority in either the Commerce Clause or the taxing power, it is a near certainty that it will also determine that the 10th is simply inapplicable as a barrier against the federal statute.

After considering the question of whether Congress generally has the authority to create an individual health insurance mandate, the question will then become whether such a mandate violates liberties preserved under the first nine amendments to the U.S. Constitution. The relevant provisions are contained in the First, Fifth, and Ninth Amendments.<sup>20</sup> The Supreme Court has previously recognized that the Constitution protects citizens’ rights to associate with others of their choosing,<sup>21</sup> to enter into contracts, to make their own decisions regarding health care, and, of course, their right to privacy.<sup>22</sup> A violation of any one of these rights could be sufficient to invalidate the health insurance mandate.

Unfortunately, merely establishing an infringement of constitutional rights does not usually end the analysis. In fact, the Supreme Court has long permitted infringement of these kinds of liberty, as long as the government could advance an interest in doing so that a majority of the justices considered

14 U.S. Const. Art. I, § 8.

15 U.S. Const. Amendment XVI.

16 This might be possible, though politically impractical. First, they could not apply such a tax against everyone. It would have to take the form of some kind of an income tax or else it would violate the constitutional prohibition on “capitation” or “direct” taxes. See Article I, section 9. So, in order to mirror the effect of the current proposal while relying on the taxing power, they’d have to jack up the income tax rates by two percent across the board, then offer a two percent tax credit for anyone who obtains a qualifying health insurance policy. That would likely pass muster, constitutionally, but it would almost guarantee an enormous political backlash because people hate having their taxes raised—even if many would have a relatively easy way to get out from under it. This approach, by the way, would also make it much harder to exempt people with religious reasons for not obtaining health insurance, which would be another major knock against such a plan.

17 “The test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment. There is a marked distinction between taxation for revenue, as authorized and limited by Article I, Sections 2 and 9 and Clauses 3 and 4 of the Constitution, and the imposition of sanctions by the Congress under the commerce clause. The power of Congress to ‘regulate commerce’ is the power to prescribe the rules by which commerce is to be governed and the Congress is at liberty to adopt any method which it deems effective to accomplish the permitted end. Congress has a discretion as to what sanctions shall be imposed for the enforcement of the law and this discretion is unlimited so long as the method of enforcement does not impinge upon some other constitutional prohibition.” *Rogers v. United States*, 138 F.2d 992 (6th Cir. 1943)

18 It might be argued that the penalties for failing to obtain health insurance could be considered an “income tax” of the sort that is exempted from the limitations of Article I, section 9. I think that such a penalty could not be considered an “income tax” because it would be selectively applied and collected separately from the general income tax authorized in the Sixteenth Amendment.

19 U.S. Const. Amendment X.

20 While the U.S. Supreme Court has rarely discussed the Ninth Amendment as a substantive source of individual liberties, its text—“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people”—suggests that it should be seen as such. See Justice Arthur Goldberg’s concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

21 U.S. Const. Amendment I.

22 U.S. Const. Amendments V and XIV (Due Process Clause).

## The courts would have to decide whether a state's guarantee of liberty to its citizens can protect them from actions of the federal government that would violate that liberty.

sufficiently important. In the case of the individual health insurance mandate, the government's interest is to make insurance premiums more affordable and, thus, to increase the number of people with access to health care. The courts will have to balance this interest against the liberty and privacy interests violated when citizens are forced to purchase coverage that they do not want and may have no intention of using. My opinion is that, particularly given the extremely high value that several current justices place on protecting the privacy rights of individuals, it will be difficult for the Solicitor General to convince a majority that the potential for lower health insurance premiums (because, in fact, there is no guarantee that the plan will work in the way Congress intends) can justify forcing someone to disclose private information about themselves and their health care.

### The Health Care Freedom Amendment

If everything I've discussed above fails to persuade the courts to strike down the individual health insurance mandate, then the arguments will come down to state constitutional protections. This is one reason (but not only *one* reason) why Alaskans should take the Health Care Freedom Amendment seriously.

The Bill of Rights in the U.S. Constitution does not demarcate the outer limits of individual freedoms to which citizens are entitled. Rather, it merely

establishes a baseline of liberty that cannot be violated by any level of government. The states, however, each have their own constitutions, and those documents can—and frequently do—provide an even higher level of protection for liberty than is afforded by the U.S. Constitution. Generally speaking, these additional protections are only applied against the actions of state and local governments, but if Congress tried to enforce a law that directly violated the terms of the Health Care Freedom Amendment (or some other freedom guaranteed under a state constitution), the courts would have to decide whether a state's guarantee of liberty to its citizens can protect them from actions of the federal government that would violate that liberty.

This is currently an open question. There are cases in which federal courts have noted that the application of a federal statute could result in a violation of certain freedoms secured under state constitutions. In several of these cases, the courts required the government to come up with a sort of alternative structure that would respect the state constitutions—but in each of those cases there were also usually indications from Congress that they wanted to avoid violating state constitutional freedoms. In the case of the individual health insurance mandate, it would seem clear that Congress is not concerned with respecting state constitutional protections. This would set up a battle under the U.S. Constitution's Supremacy Clause.

The Supremacy Clause, found in Article VI, reads as follows:

*“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”*

Of course, the central question here will be just how the courts will apply this language. The answer may not be as simple as it seems. Despite the text's indication that state laws and constitutions are subject to federal laws and treaties, a look into history shows that several important Founders rejected the idea that Congress could always enforce laws deemed unconstitutional by the states. When in 1798 Congress passed the Alien and Sedition Laws, which made it a criminal offense to publicly criticize certain government officials, James Madison—widely known as the Father of the Constitution—and Thomas Jefferson—author of the Declaration of Independence and the sitting Vice-President—drafted the Kentucky and Virginia Resolutions, in which those states rejected the constitutionality of the acts.<sup>23</sup> The U.S. Supreme Court was not called upon to resolve the question of whether states could legitimately deny

<sup>23</sup> Madison later said that, in his opinion, these resolutions were primarily useful as tools through which the power of Congress could be called into question—though not necessarily nullified. He believed that similar resolutions would signal to other states the potential necessity of modifying the current system of government to eliminate further abuses.

congressional authority in this way, but up until the Civil War different states repeatedly adopted similar measures.<sup>24</sup>

Without any directly applicable judicial precedent, some legal scholars have attempted to guess at how the justices might be inclined to resolve such a conflict between state constitutional liberties and federal laws. One of my colleagues, Clint Bolick, a co-founder of the Institute for Justice and the current leader of a constitutional litigation center at the Goldwater Institute in Arizona, has noted a recent judicial trend in which the Supreme Court has shied away from allowing federal laws to trump state constitutional requirements.<sup>25</sup> This might well signal that the justices are inclined to protect freedoms enshrined in state constitutions, but the only way we will be sure is if the U.S. Supreme Court is presented with a direct conflict. The Health Care Freedom Amendment, if adopted by the people of this state, could provide just such a conflict.

### Summing Up

Now that Congress has passed the health care reform law, it will likely be several years before a case evaluating the constitutionality of the individual health insurance mandate reaches the U.S. Supreme Court. In fact, we have already seen a number of lawsuits filed in federal courts. Once the federal district courts have decided that this issue is ripe for adjudication, they are likely to deal with the issues quickly, render a decision, and kick the cases up to the circuit courts.

Once the circuit courts have weighed in on the constitutional issues, the Supreme Court will choose the set of facts on which it will base its consideration of the law. Keep in mind that it doesn't have to take the *first* case to get resolved by a circuit court, although it only takes four justices agreeing in order to get a case in front of the Supreme Court.

When the issue gets in front of the Court, I believe that proponents of the mandate (in other words, the Solicitor General) will have to satisfactorily answer at least two vitally important questions if they are to win a majority: 1) If the Commerce Clause permits Congress to force individuals to purchase goods and services that they do not want, where is the limit of that power—if, indeed, a limit can be articulated?, and 2) Is Congress's interest in (potentially) lowering the cost of health insurance premiums sufficiently compelling as to justify forcing individual citizens against their will to associate with others and to divulge to them all sorts of private information about one's health?

I believe, based on the current composition of the Supreme Court,<sup>26</sup> that the individual health insurance mandate would probably be found unconstitutional, either as a violation of the Commerce Clause or the individual right to privacy. I cannot see any of the four conservative-leaning justices (Roberts, Alito, Scalia, or Thomas) approving such a mandate as an exercise of the Commerce Clause, nor can I see any of the three liberal-leaning justices (Ginsburg, Breyer,

and Sotomayor) disapproving the mandate. The deciding factor, then, will be whether Justice Kennedy will go for or against it, and I believe that will largely depend on how the Solicitor General articulates what limits might remain on congressional authority if the mandate is approved.

A more interesting question is how the justices might vote on the question of whether the right to privacy precludes the imposition of an individual health insurance mandate. Justices Thomas and Scalia have both rejected the notion that there is any such right to be found in the constitution, making it unlikely that they would rely on this right to strike down legislation as unconstitutional. On the other hand, several of the more liberal justices have previously written passionately about the importance of the right to privacy. It is possible that the privacy question might result in a majority of justices voting to strike down the mandate, but with Scalia and Thomas dissenting on this point.

Either way, the Supreme Court is likely to find that an individual health insurance mandate violates the provisions of the U.S. Constitution. While the Supreme Court is thus unlikely to reach the question of whether the Health Care Freedom Amendment would be seen as an additional bulwark for liberty, the adoption of this amendment would at a minimum offer the potential for a case that would test the boundaries of state sovereignty under our current constitutional system. ■

24 Many northern states refused to enforce the provisions of the Fugitive Slave Acts passed by Congress. Indeed, South Carolina's attempted nullification of a tariff passed by Congress in 1832 nearly sparked secession and armed conflict.

25 Instead, the Supreme Court has generally tried to avoid finding a direct conflict between federal laws and state constitutional provisions. For example, in *Wheeler v. Barrera*, 417 U.S. 402 (1974), Congress had passed Title I, which required public educational funds to be distributed to disadvantaged children regardless of the schools they attended. This conflicted with Missouri's constitutional prohibitions against public dollars being sent to religious schools. Rather than address this apparent conflict, the Supreme Court noted that the legislative history of Title I suggested that Congress was sensitive to the presence of such state constitutional provisions and that they did not intend to require violation of those provisions. To get around the problem, the Court decided that a separate public fund—which would not be part of the state treasury—would be established as the conduit for Title I funds to the assistance of needy children in religious schools.

26 The April 9, 2010, announcement that Justice John Paul Stevens would be retiring from the Supreme Court is unlikely to alter this analysis. Justice Stevens was a reliable vote in favor of governmental authority to regulate individual citizens' lives, and he was widely expected to favor the constitutionality of the new health care reform law. Thus, no justice appointed by President Obama will improve the likelihood of the mandate's constitutionality being upheld—and they might actually become a vote *against* the mandate's constitutionality.

# Additional READING

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