

So What If ACA Is Unconstitutional?

Stocks of hospitals and Medicaid contracted managed-care companies plunged on the announcement of [Judge Reed O'Connor's ruling that the Affordable Care Act \(ACA\) is unconstitutional](#). Some advisors consider this a “buying opportunity,” expecting that the ruling will be reversed on appeal. This shows who the important stakeholders are.

Medicaid [managed-care contractors get a monthly payment for each enrollee](#), whether any care is provided or not. The majority of newly insured people are in expanded Medicaid. And the vast [majority of Medicaid recipients are in managed care](#).

The quality of coverage may be very poor. In fact, all ACA coverage is likely to be worse than the plans many had before ACA. Forced to take added risk by the “pre-existings protections,” insurers cut quality, through narrow networks, limited drug formularies, and various ploys to make themselves unattractive to people with expensive problems. Insurers who can't turn a profit—or have a loss rather than an excess if they are “nonprofit”—leave the market. Then there's less competition for the big players skilled in systems gaming.

Where in the Constitution does Congress get the authority to outlaw the plans that millions have chosen to purchase to help pay medical bills, and force them to buy a product they can't afford and don't want? It is nowhere to be found. This is why the Association of American Physicians and Surgeons (AAPS) [challenged its constitutionality](#) as soon as ACA passed.

Since the New Deal, however, the Constitution has been taken to mean whatever a judge says it does.

Various judges have handed down differing rulings on ACA. In 2012, a 5:4 U.S. Supreme Court majority held that the Commerce Clause, which allows Congress to “regulate interstate commerce,” does not extend so far as to allow Congress to make people buy something.

ACA would have been declared unconstitutional except that [Chief Justice Roberts found a way to save it](#). He declared the “shared responsibility” payment or individual mandate—the penalty for not purchasing an acceptable plan—to be a tax. Before that, proponents argued that it was *not* a tax. The government's taxing power is virtually unlimited. So, the mandate to purchase insurance isn't really forcing you to buy a product, which would be unconstitutional. You have the choice of paying a tax instead.

Along came the Tax Cuts and Jobs Act (TCJA) and zeroed out the individual mandate. TCJA couldn't repeal it because this was budget reconciliation, so the act had to be restricted to financing. Texas and other states argued that the rationale for constitutionality had been removed, so ACA is unconstitutional.

The Judge also ruled that the whole of ACA is unconstitutional because the individual mandate is not severable. It's the linchpin of ACA, as everybody agreed before the law was passed. Its architects knew perfectly well that premiums would soar, and low-risk people would choose not to

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paid them so they would go even higher (the insurance “death spiral”)—unless people were punished for not buying. The penalty was scheduled to reach 2.5% of your income.
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So, what happens now? The Judge has stayed his ruling pending appeal to avoid disruptions while a new constitutionality rationale is devised. Thus, ACA is still the “law of the land.” (That’s supposed to be the Constitution.) ACA defenders argue that a tax of \$0 is still a tax although it raises no revenue, and the law’s unconstitutional requirement to buy ACA-compliant insurance isn’t really a law because the millions of scofflaws who disobey it won’t be punished, at least not until Congress passes a new penalty.

The AMA doesn’t want ACA overturned, ostensibly because that might cause 20 million people to lose “healthcare” (i.e. overpriced, generally poor insurance). Never mind that ALL Americans are hurt by ACA’s destruction of true insurance, by the \$1 trillion increase in spending, by the disruption of their prior care, by the restriction of medical choices, and by the chaos that comes from the loss of consistent, understandable law.

Without the individual mandate, but with ACA’s federal insurance rules still in place, Americans have a tough choice: Buy unaffordable, undesired, even objectionable coverage—or be uninsured.

All of ACA, which imposes a straitjacket on a previously diverse, state-regulated industry, needs to be declared unconstitutional—as it surely is, based on any reasonable reading of our founding law.