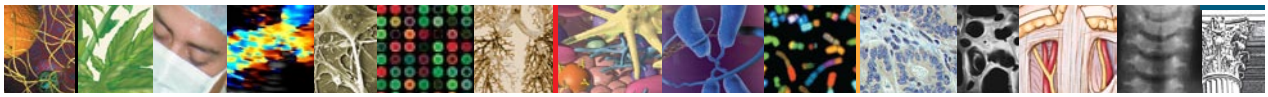

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Perspective

Buying Health Care, the Individual Mandate, and the Constitution

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In *Rashomon*, a classic film that explores the concept of truth, director Akira Kurosawa presents a story about a single incident retold by four narrators, leaving the audience to figure out what is real.

Litigation has a *Rashomon*-like quality to it: two sides meet in a courtroom and each presents its case, arguing not only that abstract legal principles favor its cause, but equally important, that its version of the event that gave rise to the dispute should be the filter through which the court decides the matter.

Three separate cases raising constitutional challenges to the Affordable Care Act (ACA) are now under way,[1-3] and together they present issues of great legal complexity.[4] Yet although difficult legal questions must be resolved, a pivotal issue is whose version of events will serve as the judicial analytic filter. For reasons related to the very basis of Congress's constitutional power to enact health care reform, the fight is over whether the individual mandate to purchase health insurance (or pay a tax) is about regulating individuals' economic conduct or regulating their noneconomic status. Depending on which characterization of the facts prevails, the individual mandate either falls within or lies outside Congress's power to act.

The Supreme Court precedents indicate that the framers of the U.S. Constitution vested Congress with enormous powers to regulate individual economic conduct, even as they limited congressional authority over noneconomic activity. The source of this power to regulate economic activity down to the individual level is found in the Constitution's Commerce Clause (article 1, section 8, clause 3), on whose reach the legal resolution of these cases ultimately depends. This clause explicitly grants Congress the authority to regulate interstate commerce.

In *Gonzalez v. Raich*, a 2005 decision involving federal regulation of home-grown marijuana, the U.S. Supreme Court concluded that growing marijuana amounted to economic activity and interpreted the Commerce Clause as permitting Congress to reach the "consumption of commodities for which there is an established and lucrative interstate market." In other cases involving the constitutionality of federal laws sanctioning individual conduct — gun possession on school grounds (in *United States v. Lopez*, 1995) and

domestic violence (in *United States v. Morrison*, 2000) — the Court concluded that the specified activities did not amount to economic conduct within the definition of the Commerce Clause. To be sure, both gun possession and violence against women have economic consequences, but an indirect economic effect is insufficient to warrant congressional regulation. As a result, only states, using their police powers, can directly regulate such activity, which lies beyond the limits of Commerce Clause control.

Thus, the outcome of the battle over the individual mandate turns on whether the courts understand the ACA as a law that regulates economic conduct. Complaints recently filed by the state of Virginia and by multiple state claimants in Florida represent a direct challenge to the proposition that economic conduct is involved. In their complaint, the multistate plaintiffs argue that the law should be viewed as an attempt "to regulate and penalize Americans for choosing not to engage in economic activity." Similarly, in his June 2010 brief, the Virginia attorney general argues that the ACA must be understood as an attempt to compel individuals to undertake economic conduct by forcing them to buy health insurance. In other words, highly cognizant of the distinction drawn in *Raich* between economic and noneconomic conduct, the plaintiffs argue that health care reform is a blatant attempt to force an economic undertaking; they frame the ACA as a law about status (being uninsured) rather than about economic activity.

The U.S. government, on the other hand, frames the law as precisely about Americans' buying practices in relation to a commodity "for which there is an established and lucrative interstate market." In its briefs in the Florida and Virginia cases, the U.S. Department of Justice argues that the ACA is a quintessential economic regulatory effort because it addresses the when and how of paying for health care (a market commodity that almost all Americans will purchase at some point, either because they plan to or because of an unforeseen event). In its argument, the Justice Department lays out the congressional findings that undergird the ACA, which highlight the economic imperative of health care reform in order to save a health care system that is fundamentally failing the tens of millions of Americans who are either uninsured or faced with purchasing insurance in a dysfunctional insurance market.

From an economics standpoint, the conclusion is clear: the purpose of the ACA is to regulate how Americans buy health care, which is clearly economic conduct. Above all, the ACA's fundamental goal is to stabilize the vast U.S. market for health care services — which accounts for 17.5% of the gross domestic product, according to Congress — along with the health insurance system on which nonelderly Americans rely as a principal means for financing their health care. The law's goal is revealed through extensive legislative findings that are set forth in the ACA. The goal also can be seen in the act's provisions that collectively are aimed at making the insurance market work for millions of Americans who, because of their income, health status, or both, have been locked out of affordable, accessible, and stable coverage and must therefore try to pay for care at the point of service.

The existing system has broad economic implications for both the insured and the uninsured. Far from being passive and noneconomic, the uninsured consume more than $50 billion in uncompensated care, the costs of which are passed through health care institutions to insured Americans. Moreover, medical expenses not covered by insurance are one of the leading causes of bankruptcy in the United States, and the costs of resolving those bankruptcies are borne throughout the U.S. economy. In addition, the lack of health insurance leads to poorer health, which can, in turn, reduce workplace productivity. Even the possibility of losing health insurance makes many workers afraid to leave their jobs for more productive positions elsewhere, so the current system reduces the overall productivity of the U.S. labor force.

The changes made by the ACA to stabilize the insurance market are fundamentally economic. The legislation's core is its mandate to end pervasive discriminatory insurance practices while making care affordable. But such change is not possible without an individual mandate. If people who are in better health can opt out of the market and effectively gamble that they can pay for whatever health care they need at the point of service, prices rise for those who are in poorer health, leading to an "adverse selection" spiral that raises insurance prices for all. This is not an idle conjecture. Five states have tried to undertake reforms of the nongroup insurance market like those

in the ACA without enacting an individual mandate; those five states are now among the eight states with the most expensive nongroup health insurance.

In the end, the ACA is all about altering individual economic conduct, and its importance lies in the way it changes the when and how of health care purchasing. By ensuring access to affordable coverage for most Americans, the law seeks to rationalize our economic behavior while providing the regulatory and subsidization tools to make this rationalization possible. To characterize the ACA as a law aimed at anything other than individual economic conduct is to fundamentally miss the point of the legislation.

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