

New Jersey Law Journal

Editorial Miscontrues the Central Problem With Obamacare

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Dear Editor:

As the attorneys representing the plaintiffs in *New Jersey Physicians, Inc., et al. v. Obama, et al.* , No. 10-4600, pending in the Third Circuit, we take strong exception to the *Law Journal'* s editorial about the case ["Health Care Reform Litigation," Feb. 21].

In an obviously partisan effort to "whistle in the dark," the author of this nearsighted editorial misconstrued the essential problem with the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)("PPACA"), and in particular, the so-called "individual mandate" in that statute, Section 1501, which requires that a substantial number of American citizens purchase a product, or suffer a penalty for failure to do so.

Contrary to your editorial, the Commerce Clause power of the federal government does not extend to compelling citizens to engage in commerce, which is precisely what the "individual mandate" does. The arguments advanced against the "individual mandate" do not seek to overrule *Wickard v. Filburn* , 317 U.S. 111 (1942). In fact, the legal arguments advanced against the "individual mandate" are in accordance with the language of the U.S. Constitution and with judicial precedent interpreting the Commerce Clause, including *Wickard* .

Wickard is perhaps the farthest the Supreme Court has ever gone in extending the power of the federal government to reach and regulate activity under the Commerce Clause. In *Wickard* , of course, a farmer grew wheat that was used entirely on his own farm, and never crossed state lines or even entered into the stream of commerce. Nevertheless, the Court held that, since the farmer's activity in growing this wheat had an effect on the interstate wheat market as a whole, the Commerce Clause therefore permitted the federal government to regulate this wheat.

The analogy drawn in the editorial between the "individual mandate" in the PPACA and the regulations at issue in *Wickard* is, at best, flawed. In *Wickard* , the farmer engaged in an activity, growing wheat. By contrast, the "individual mandate" in the PPACA does not seek to regulate an activity; instead, it compels activity, the purchase of a product (health insurance). It is quite a leap, indeed, to go from regulating an activity in which one has chosen to engage (such as growing wheat in *Wickard* , or growing marijuana in *Gonzales v. Raich* , 545 U.S. 1 (2005)), and forcing a citizen to purchase a product he or she does not want.

The editorial writer has engaged in a silly semantic game, claiming that the Supreme Court in *Wickard* was

regulating the farmer's "decision" to forgo the wheat market. What the Court held was subject to regulation in *Wickard* was the farmer's activity in growing the wheat, and not his decision whether or not to forgo placing his wheat into commerce. To draw a proper analogous fact pattern between *Wickard* and the "individual mandate" in the PPACA, one would have to posit a government scheme which compelled the farmer to grow wheat, whether he wanted to or not. This, of course, was not the issue in *Wickard*, and if it had been, it would have been inconceivable for the Court to have upheld such a scheme. (Such a scheme might have been the stuff of Stalin's five-year plans, but it is not the stuff of our constitutional, limited-powers system of government.)

If the theory the editorial posits is true, then the federal government is free to compel any citizen to engage in any activity or purchase any product, as long as it can be said that a decision to forgo that activity or purchase could have some effect on interstate commerce. For example, now that the federal government owns a substantial share in General Motors, it would no doubt be beneficial to the government if every American citizen bought a GM car every four years. Under the rationale espoused in your editorial, it would be within the Commerce Clause powers for the government to mandate such purchases, as the sale of automobiles (or the "decision" to forgo such a purchase) undoubtedly has an effect on interstate commerce. This is not, and never has been, the law in this country. To adopt the position advocated by this editorial would be to remove all limits on the power of the federal government and to permit the federal government to possess general police powers that have heretofore been limited to state and local governments.

For what is supposed to be a legal newspaper, this editorial, advocating an "end justifies the means" approach on the basis of your editorial board's evident opinion that the PPACA is "good," regardless of whether it comports with constitutional imperatives, is frankly shocking. No doubt you also endorse the Obama administration's flagrant contempt in disregarding an order of a federal district court, which has neither been stayed nor reversed, by moving forward with implementing the PPACA even though it has been declared unconstitutional. We guess the ends justify the means, and we only need to obey laws and court rulings that we agree with, regardless of what a federal judge, or the constitution, may say.

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