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## **Federalism and the Affordable Care Act**

*Remarks of F. Scott McCown*

The Center for Public Policy Priorities Executive Director F. Scott McCown made the following remarks at the Texas Public Policy Foundation's 9th Annual Policy Orientation on January 13, 2011, debating Ted Cruz, former Solicitor General of Texas, on federalism and the Affordable Care Act.

Good morning. I am impressed by those of you who got up for an 8 A.M. breakfast to hear two lawyers talk about the Constitution. I appreciate Brooke Rollins and the Texas Public Policy Foundation inviting me to speak with you today, and I congratulate Ted Cruz on launching the new Center for Tenth Amendment Studies.

The Center for Public Policy Priorities, where I work, was founded twenty-five years ago by Benedictine Sisters to seek access to health care for the poor. Our support for national health care reform through the Affordable Care Act of 2010 comes from the values imparted to us by the Sisters—a belief that ensuring access to health care is the right thing to do—and our own policy studies—which convince us that ensuring access to health care is the smart thing to do.

But today I will speak to whether the Affordable Care Act is a constitutional thing to do, using it as a case study to comment on the constitutional issues Ted raises. I will make three points: 1) Congress appropriately undertook national health care reform; 2) Congress had more than sufficient power to enact the Affordable Care Act; and 3) If the Affordable Care Act is struck down by the Supreme Court, you may get something you want less.

I will begin my first point by reading the opening words of our Constitution: “We the People of the United States.” These ringing words herald the first constitution in history to be submitted to the People for ratification—the People, not the states. The United States of America is a democracy of the People, not a confederacy of the states, and the People need health care reform.

In the United States over 17% have no health insurance, leaving over 50 million people uninsured. Texas has the highest uninsured rate in the nation—over 26%, leaving almost 6 and a half million Texans without health insurance, including over 1.2 million children.

And the growing cost of health care is undermining both family and public budgets. Medical bills are the number one cause of personal bankruptcy in America. The federal government and the states are hard pressed to keep up with growing cost of health care. We have a serious national problem, and we need a meaningful national solution.

Reform at the state level is impossible:

Structurally, states can't individually reform health care. If a state individually mandated that insurance companies provide coverage or if a state offered a publicly financed option to all residents, that state would become a magnet for people with health problems. As sick people moved to the state, insurance companies could not afford to do business in the state, nor could the state afford to provide publicly financed coverage. The system would implode.

Financially, many states, such as Texas, lack the capacity to pay for health care reform. States with a high percentage of residents without health insurance are usually states with more poor people and below-average to average wealth. Such states would be hard pressed to come up with the money for health reform.

Our Founders created our national government to provide action in the very sort of situation in which we find ourselves. We have a national problem that the states individually are unable to address. Consequently, Congress appropriately undertook national health care reform.

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Polls show that from 31 to 52 percent of Americans want to expand the Affordable Care Act or leave it as it is. The same polls show that only 26 to 33 percent of Americans want to repeal it entirely. When asked to say separately whether each of the six major provisions of the Affordable Care Act should be repealed, the majority support keeping five! For example,

- 71 percent want to keep provisions prohibiting insurance companies from denying coverage based on pre-existing conditions, and
- 71percent want to keep financial help to lower-income Americans to help them purchase coverage.

In fact, the more people learn about the Affordable Care Act, the more they like it, which is why I brought for you today our explanation of the act in [\*What Every Texan Should Know about the Health Care Reform Law\*](#).

Here is how the Affordable Care Act works. Congress expanded Medicaid to cover more low-income citizens and created insurance exchanges where everyone else can buy private health insurance on a sliding scale based on family income. With some exceptions, everyone must either obtain health insurance or pay a tax penalty; this is the so-called individual mandate.

Insurance companies cannot deny coverage to those with pre-existing conditions, which is why the individual mandate is essential and why insurance companies insisted it be included in the act. Without the individual mandate, people could wait until they got sick to buy coverage, leaving insurance companies losing money on only a pool of sick people. With the individual mandate, most everyone is in the pool, helping companies make money and keeping premiums affordable.

Under our Constitution, Congress had more than sufficient power to enact the Affordable Care Act. While our federal government is a government of limited powers, “limited” in this context means listed or enumerated, not weak. Under the enumerated powers of Congress, it is easy to find authority for the Affordable Care Act.

When an individual seeks health care or buys health insurance he becomes part of interstate commerce. The Constitution’s Commerce Clause expressly gives Congress authority “to regulate Commerce . . . among the several states.”

In an attempt to get around the Commerce Clause, Ted argues that requiring an individual to buy health insurance is unconstitutional because it would, and I quote, “be the first time the federal government has required citizens to purchase a good or service as an exercise of commerce power.”

Of course, to say it is the first time Congress has done something doesn’t make it unconstitutional. Moreover, Congress is not requiring citizens to purchase a good or service. Congress is giving citizens an option to purchase health insurance or pay a reasonable tax penalty. And, Congress is not exercising commerce power when it imposes this choice. Rather Congress is exercising its power under Article I, Section 8, the Necessary and Proper Clause, “To make all Laws which shall be necessary and proper for carrying into Execution” its enumerated powers.

As a separate basis of authority for the Affordable Care Act, the Constitution gives Congress the power “to lay and collect Taxes . . . to provide for the . . . general Welfare of the United States.” The power to tax includes the power to tax for a regulatory purpose, such as taxing polluters who choose not to install pollution controls or citizens who choose not to purchase health insurance.

It is true that some Members of Congress and even the President said the tax penalty was not a tax. As we all know, however, saying that sex isn’t sex, doesn’t make sex not sex, and saying that a tax isn’t a tax, doesn’t make a tax not a tax. Nor is there any point in a court striking down a law as unconstitutional if all Congress has to do the second time around is call a tax a tax.

Under the Affordable Care Act, states remain free to opt out of Medicaid if they wish. Texas is subject to no penalty if we do not participate in Medicaid. Likewise, Texas does not have to operate an insurance exchange. If we don’t want to do it, the federal government will do it for us. Later in the conference panels will discuss both these policy

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choices. In any event, nothing in the Affordable Care Act “commandeers” any state officer or agency in violation of the Constitution.

Finally, the Tenth Amendment itself does not limit congressional power. Listen as I read the Tenth Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” As Justice Scalia would say, we must follow the words as written. The Tenth Amendment does not limit federal power; it merely says who has the power the federal government does not have. The Supreme Court calls the Tenth Amendment a truism.

The Affordable Care Act is plainly constitutional. But if the act is struck down by the Supreme Court, you may get something you want less. I urge conservatives to take a closer look at the Affordable Care Act. The act is based on conservative proposals for undertaking national health care reform. The act uses existing markets for health insurance and rejects a public option. And if the act is struck down, eventually the majority of Americans will demand an alternative such as a public option, which is unquestionably within Congress’ power to provide through taxing and spending for the general welfare.

Instead of legal resistance as Ted proposes, what would be best for conservatives who want to work through markets is to implement the act as effectively as possible at the state level rather than 1) leave implementation to the federal government or 2) repeal or block the act only to end up with a public option. I am certain, however, that one way or another the United States will accomplish national health care reform because no democracy will forever tolerate a state of affairs where some have health care while many others do not.

Thank you for the opportunity to speak with you today.

The Center for Public Policy Priorities (CPPP) is a non-profit, non-partisan policy center committed to improving public policy to better the economic and social conditions of low- and moderate-income Texans. We are working for a BETTER TEXAS™. You can learn more about CPPP at: [www.cppp.org](http://www.cppp.org).