Those Poor Free-Riders! Save Them!

Not, not really. Not yet.

Dan is a much more generous person than I am, and so it should be unsurprising that he believes that the Affordable Care Act cases do not threaten environmental law. I respectfully dissent.

The Affordable Care Act seeks to establish laws for the health insurance industry — an industry that comprises one-sixth of the American economy. In order to do that, it establishes a number of regulations that even its opponents concede are perfectly constitutional under the Commerce Clause — setting up insurance exchanges, banning discrimination based upon pre-existing conditions, establishing community rating, etc.

In order to avoid the inevitable adverse selection problems that come with these laws, Congress mandated that everyone must buy insurance. This prevents free-riders from gaming the system. Not only is the mandate, then, intimately tied up with national market regulations that everyone acknowledges are constitutional, it is a necessary part of this regulatory scheme. And the challengers to the law acknowledge this: that is why they yesterday contended that the law is non-severable, i.e. if the mandate is struck down, then the whole law must go.

In other words, the argument of the challengers is:

1) The mandate is a necessary and inherently connected part of laws that regulate interstate commerce; yet

2) Not included within the "necessary and proper" means for regulating interstate commerce under the Commerce Clause.

This argument is breathtaking. It does not overturn 80 years of precedent: it overturns *one hundred and ninety-three years of precedent.* Let's cut to that well-known lefty liberal, Chief Justice John Marshall:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the

> constitution, are constitutional.

Actually, it might be overturning more than 200 years of precedent. Cut to that well-known radical egalitarian socialist, Alexander Hamilton:

> [A] criterion of what is constitutional, and of what is not so … is the end, to which the measure relates as a mean. If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority. There is also this further criterion which may materially assist the decision: Does the proposed measure abridge a pre-existing right of any State, or of any individual? If it does not, there is a strong presumption in favour of its constitutionality….

If this court can overrule *McCulloch v. Maryland*, and hold that Alexander Hamilton didn't really understand the scope of federal power, then I suppose it can do anything.

Hmmm…let's see. The South Coast Air Basin lies wholly within California. Thus, it is intrastate, and the federal government has no power to regulate it. Ditto for Houston.

If the Court overturns the ACA, it's coming. Just wait.