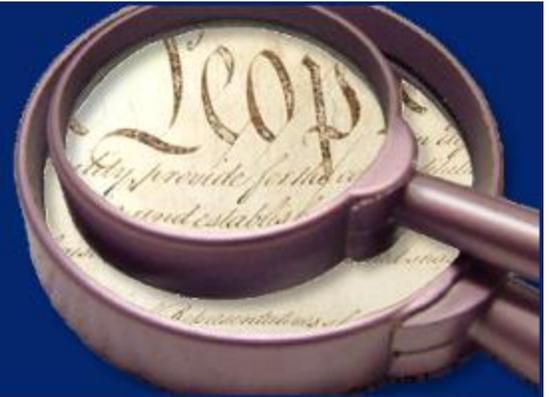




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Issue Brief

Mandatory Health Insurance: Is It Constitutional?

By Simon Lazarus

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Mandatory Health Insurance: Is It Constitutional?

Simon Lazarus*

Recently, some opponents of comprehensive health insurance reform have introduced a new contention – namely, that a cornerstone of the reform bills pending before Congress, a requirement that most individuals purchase and maintain health insurance coverage, is unconstitutional. This issue paper addresses this claim. The paper reviews the relevant features of the legislation, Congress’ rationale and record supporting the requirement (generally called the “individual mandate”), relevant constitutional provisions and judicial precedents, and reform opponents’ arguments challenging the lawfulness of the mandate. The paper concludes that the mandate is lawful and clearly so – pursuant either to Congress’ authority to “regulate commerce among the several states,” or to its authority to “lay and collect taxes to provide for the General Welfare.”¹ With respect to Congress’ interstate commerce authority, the goals that drive this legislation – including achieving universal coverage, eliminating adverse selection, eliminating pre-existing conditions as a prerequisite for coverage, facilitating broad-scale pooling of individuals not covered by group health plans, and radically reducing costly emergency room visits by uninsured individuals – are eminently lawful objects for the exercise of that power. In the context of current health insurance market circumstances and the framework of the legislation, the use of an individual mandate, structured as it is to ensure affordability for all who are subject to it, is likewise an eminently rational and well-supported (“necessary and proper” in the words of Article I, §8) means for achieving these goals. The same goals and choice of means fit the mandate snugly within precedents broadly defining Congress’ authority to tax and spend.

Opponents’ arguments to the contrary express philosophical objections to the concept of mandatory health insurance in principle, without regard to the practical issues the Supreme Court has always used to evaluate laws challenged as outside Congress’ interstate commerce authority: the practical impact of the mandate on commerce or the public welfare or the welfare of affected individuals, or the rationality of Congress’ judgments about its impact on statutory goals. No doubt, in some quarters, opponents’ libertarian views are deeply felt. But they have no basis in law, neither in the grants of authority to Congress in Article I nor in limitations on that authority in the Bill of Rights, nor in the case law interpreting these provisions. Opponents’ real grievance is with the law in its current state. Their hope is that a majority of the Supreme Court will seize on a challenge to mandatory health insurance as an occasion to make major changes in current law. But their arguments appear unlikely to gain traction with the current Supreme Court, and, indeed, represent approaches and theories that have been repudiated by justices across the Court’s ideological spectrum.

* Simon Lazarus is Public Policy Counsel to the National Senior Citizens Law Center. My colleague Sergio Munoz and Professor Timothy Stoltzfus Jost, Robert L. Willett Professor at the Washington and Lee University School of Law, provided greatly appreciated and invaluable assistance in the preparation of this issue paper, though neither bears responsibility for the views expressed here. This Issue Brief was first released by ACS in December, 2009.

¹ Both these grants of authority are prescribed in Article I, §8 of the Constitution.

I. The “Mandate” Provisions of the Health Care Reform Legislation

The individual mandate requires all otherwise uninsured Americans to purchase health insurance, if it is affordable and they do not fall within one of the other mandate exceptions. For the 58% of Americans currently covered by employer, professional, or union-sponsored group health plans, meeting this requirement will involve no change in their current status or arrangements, as long as they do not lose their jobs or find new work not covered by a group plan. Likewise, the 32% of Americans covered by Medicare, Medicaid, or other governmental insurance programs will likewise meet their obligation to acquire health insurance that meets the statutory criteria for adequate coverage.² For individuals not covered by any of the above sources, the legislation establishes a new market for policies for individuals (in the House bill, for employees of small business as well), offered through and regulated by (in the House bill) a national exchange, and in the Senate bill, state-based exchanges. The legislation requires that all such policies be provided without regard to pre-existing conditions, guaranteeing renewability of coverage, prohibiting discrimination based on age and other inappropriate factors, and otherwise eliminating or reducing barriers that have heretofore put quality health insurance beyond the reach of many people not covered by group health plans. In addition, the legislation provides for subsidies designed to make mandatory coverage affordable to all eligible persons.

The Senate bill, H.R. 3590, expressly requires U.S. citizens and legal residents to have “qualifying” health coverage – characterized as an “individual responsibility requirement” – beginning in 2014. Those without coverage pay a tax penalty of \$750 per year up to a maximum of three times that amount (\$2,250) per family. The penalty will be phased-in from 2014 to 2016. Alternatively, if it results in a higher amount, noncompliant individuals must pay .5 percent of household income for 2014, 1 percent for 2015, and 2 percent for 2015 and for later years. The obligation is capped in any event by the cost of the national average premium for a bronze level qualified plan for the relevant family size. Exemptions will be granted for financial hardship, religious objections, American Indians, those without coverage for less than three months, undocumented immigrants, incarcerated individuals, if the lowest cost available plan option exceeds 8% of an individual’s income, and if the individual’s income is below the Commerce Department’s poverty level. The Senate bill expressly provides that failure to pay the penalty cannot result in criminal liability.³

The House bill, H.R. 3962, does not contain an express mandate to carry health insurance. Instead, the House bill casts its “mandate” (technically, not a mandate) as an amendment to the Internal Revenue Code levying a “tax on individuals without acceptable health care coverage.”⁴ Functionally and conceptually, the mandate provisions in the two bills are not materially distinguishable.

² Data on health care coverage are drawn from the *AARP Bulletin* for December 2009, at pages 13-14, which cites as its sources the U.S. Census, U.S. Centers for Medicare and Medicaid Services (CMS), the Commonwealth Fund, the Kaiser Family Foundation, and an article, “In Search of health Care Reform,” *Washington Post*, June 9, 2009.

³ H.R. 3590, 111th Cong. §§ 5000A(c)-(e) (2009) (as amended by Manager’s Amendment)

⁴ H.R. 3962, 111th Cong. Title V, § 501 (2009)

II. Mandatory Insurance as an Exercise of Congress' Commerce Clause Authority is Well Supported by its Rationale, and by its Record and Pertinent Research, Analysis, and Experience With Universal Health Reform Plans in the United States and Abroad.

The Senate bill contains findings setting out its rationale for inclusion of the individual mandate.⁵ The Senate findings start by specifying Congress' reliance on its commerce clause authority, and reiterating well-established parameters for the exercise of that authority: the mandate, the findings state, is “commercial and economic in nature” and “substantially affects commerce.” Hence, the mandate is *not* “non-economic” in the sense that laws with “non-economic” purposes or subject-matters were singled out by recent Supreme Court decisions for comparatively strict judicial scrutiny from a “federalism” or “states’ rights” perspective.⁶ In other words, the mandate falls in a class of types of commerce clause-based laws on which Congress retains broad latitude, as discussed below, to craft “rational” means to achieve constitutionally “legitimate” ends.

The Findings section then proceeds to explain the basis for these foundational assertions. Paragraph (2)(A) notes that the requirement “regulates” (the Commerce Clause term) commercial-economic “activity,” i.e.: “economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.”

Paragraph (2)(B) sketches the case that “health insurance and health care services are a significant part of the national economy,” citing various statistical bases for this conclusion, such as that national health spending is already 17.6 percent of the economy and projected to nearly double by 2019.

Paragraphs (2)(C) – (2)(J) identify particular goals of the legislation and state how and why the individual mandate is an effective or essential means of achieving each goal: increasing the “number and share of Americans who are insured,” thus promoting the statutory goal of universal coverage; expanding financial security for vulnerable families; broadening the pool of insured individuals to minimize adverse selection; supporting coverage without regard to pre-existing conditions; reducing administrative costs; and lowering insurance premiums.

Paragraph (2)(D) states that the mandate “achieves near-universal coverage *by building upon and strengthening the private employer-based health insurance system*” (emphasis added). This is an especially significant point. As noted below, opponents challenging the validity of the mandate concede that Congress could lawfully establish a government-funded and managed (single-payer) health insurance system with universal mandatory individual contributions, using its powers to tax and spend under Article I, §8 of the Constitution (of course, Medicare is precisely such a program). But Congress has chosen not to totally displace the existing mixed public-private system. To attain universal coverage while retaining this mixed system, Congress must mandate that individual contributions purchase private sector coverage, rather than (as taxes) pay for governmental insurance.

⁵ H.R. 3590, 111th Cong. § 1501(a) (2009)

⁶ The two cases are *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), discussed immediately below.

Other paragraphs in the Findings tightly link the mandate to the achievement of specific statutory goals. Paragraph 2(A), for example, specifies that without the mandate, “some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases risk to households and medical providers.” Paragraph 2(F) puts the cost of providing uncompensated care to the uninsured at \$43,000,000,000, which raises family premiums by \$1,000 per year. Paragraph 2(G) notes that 62% of all personal bankruptcies are caused by medical expenses, and states that the requirement, by increasing health insurance coverage, will strengthen financial security for families. Paragraph 2(I) explains why and how the mandate will minimize “adverse selection” and “broaden the risk pool” to “lower health insurance premiums.”

In short, the Senate bill findings state that the subject-matter of the mandate – decisions about how and at what point to pay for health insurance and/or health care – is in and substantially affects interstate commerce, and explain why the mandate is an essential means to achieving statutory goals within Congress’ authority to regulate interstate commerce. As noted above, the House bill contains no findings, and formally achieves the common goal of universal coverage purely by way of a tax incentive. But the Senate’s Commerce Clause rationale encompasses and applies with equal force to the functionally equivalent provisions of the House bill.

III. Relevant Constitutional Provisions and Supreme Court Precedents Confirm the Senate’s Commerce Clause-based Justification for the Individual Mandate.

- A. The Individual Mandate Regulates Activity that is “in” Interstate Commerce and Constitutes a “Necessary and Proper” Means of Attaining Lawful Statutory Goals.

As the Senate Findings note, the Supreme Court decades ago, in 1944, held that the business of insurance fell within Congress’ regulatory authority under the Commerce Clause.⁷ The Court emphasized, in terms pertinent here, that its central responsibility “is to make certain that the power to govern intercourse among the states remains where the Constitution placed it... in the Congress, available to be exercised for the national welfare as Congress shall deem necessary.”⁸ More specifically, the Court observed:

Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.⁹

The *Southeastern Underwriters* Court’s description of the factual case for federal regulation of insurance current in 1940 could hardly be more consonant with Congress’ identical case for expanding federal regulation of health insurance in 2009. That Court’s exposition of Commerce

⁷ *United States v. Southeastern Underwriters Ass’n*, 322 U.S. 533 (1944)

⁸ *Id.* at 533

⁹ *Id.* at 540

Clause legal doctrine has been repeated many times, both before and after the *Southeastern Underwriters* decision.¹⁰

To challenge the precedential definitiveness of these cases, opponents cite two decisions issued near the end of the previous decade, in which, for the first and only times since the New Deal era, a majority of the Court invalidated federal statutory provisions as exceeding Congress' Commerce Clause authority. These 5-4 decisions, *United States v. Lopez*¹¹ and *United States v. Morrison*,¹² in no way undercut the force of *Southeastern Underwriters* and the many other precedents dating back to Chief Justice Marshall's original broad demarcation of Congress' Commerce Clause authority, which recognized the clause as "the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation."¹³ *Lopez* and *Morrison* reiterated and reaffirmed the established categorization of objects fit for federal legislation implementing the Commerce Clause:

(1) the "channels of interstate commerce;"

(2) the "instrumentalities of interstate commerce, and *persons or things in interstate commerce*;" and

(3) "activities that 'substantially affect' interstate commerce."¹⁴

Both *Lopez* (federal criminal prohibition on guns within 1000 yards of a school) and *Morrison* (federal criminal prohibition on gender-motivated violence) involved statutes addressed to activities that the Court majority characterized as "non-economic" or "non-commercial" in nature; these cases stand for the proposition that Congress may not regulate individual instances of such "non-economic" activities – and only such activities – merely on the unsubstantiated assertion that, if repeated many times over, they could substantially affect interstate commerce.¹⁵ More recently, in *Gonzales v. Raich*, (prosecution under the Controlled Substances Act of individuals for growing marijuana for home medicinal use is valid under the Commerce Clause), the Court clarified that, in situations where intrastate activities are connected to and/or affect

¹⁰ See e.g. *United States v. Darby*, 312 U.S. 100, 118-119 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280 (1981); *Gonzales v. Raich*, 545 U.S. 1 (2005)

¹¹ 514 U.S. 549 (1995)

¹² 529 U.S. 598 (2000)

¹³ *Raich*, 545 U.S. at 16. Chief Justice Marshall firmly established the breadth of Congress' authority under the Commerce Clause in such decisions as *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Commerce Clause authorizes establishment of a National Bank), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (Ferry monopoly under state law preempted by Congress exercising Commerce Clause powers).

¹⁴ *Lopez*, 514 U.S. at 558-59; *Morrison*, 529 U.S. at 608-09 (emphasis added)

¹⁵ *Lopez*, 514 U.S. at 561-67; *Morrison*, 529 U.S. at 615-17. In *Lopez* Chief Justice Rehnquist's opinion for the Court explained that the law at issue "is a criminal statute that by its terms has nothing to do with commerce" or any sort of economic enterprise, however broadly one might define those terms. [It] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."

interstate commercial or economic markets, Congress retains all its broad regulatory authority conferred by earlier Commerce Clause decisions.¹⁶

But, however broad Congress' authority to regulate intrastate non-commercial or non-economic activities may or may not be, the answer to that question could not impugn a federal law prescribing mandatory health insurance. In line with the Senate Findings, health insurance, including whether and on what terms individuals acquire and maintain health insurance, comprises "persons or things *in* interstate commerce." Obviously, individual decisions with respect to health insurance "substantially affect" interstate commerce. Even apart from their effects, as Justice Scalia, concurring in *Gonzales v. Raich*, explained, the appropriateness of such items for regulation under the Commerce Clause, is "*self-evident, since they are the ingredients of interstate commerce itself.*"¹⁷

If health insurance is itself an "ingredient" of interstate commerce and "self-evidently" within Congress' Commerce Clause authority, the statutory goals for broadening, making more efficient and less costly, and otherwise improving health insurance coverage, specified in the Senate Findings, fit equally within that authority. Further, the individual mandate requirement easily qualifies as a "necessary and proper" means of achieving those goals, under the standard first articulated by Chief Justice Marshall and adhered to since:

"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."¹⁸

Many independent experts, studies, and analyses concur in Congress' judgment that health reform with universal coverage must include a responsibility requirement; without it, not enough individuals will participate in a voluntary system, adverse selection will continue, the government will continue to overpay for care for the uninsured, and overall health reform will be unsustainable.¹⁹ Experience in other countries with universal coverage programs confirms these

¹⁶ *Raich*, 545 U.S. at 23 ("Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class") (citing *Perez v. United States*, 402 U.S. 146, 154 (1971)). Importantly, Chief Justice Rehnquist's *Lopez* opinion emphasized, 514 U.S. at 564, that the statute at issue had no "jurisdictional element" requiring a connection between individual acts to be prosecuted and interstate commerce; Congress immediately re-enacted the provision after adding a requirement that weapons that form the basis of prosecution must be shown to have traveled in interstate commerce. The new law was promptly upheld by the Eighth Circuit, and the Supreme Court declined to grant certiorari. *U.S. v. Danks* 221 F.3d 1037, *cert denied*, *Danks v. U.S.* 528 U.S. 1091. Furthermore, the *Lopez* opinion stressed that, in contrast to the Senate health reform bill, Congress had inserted no findings in the statute linking school violence to goals within the purview of Congress' Commerce Clause writ. *Lopez*, 514 U.S. at 564.

¹⁷ *Raich*, 545 U.S. at 34 (emphasis added)

¹⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)

¹⁹ The Senate Finance Committee Report accompanying the precursor of H.R. 3590 succinctly states: "To ensure the insurance market reforms function properly, the [bill] would create a personal responsibility requirement for health care coverage[.]" S. REP. NO. 111-89 (2009), available at <http://finance.senate.gov/press/Bpress/2009press/prb102109a.pdf>; The academic consensus is summarized in LINDA J. BLUMBERG AND JOHN HOLAHAN, URBAN INSTITUTE, DO INDIVIDUAL MANDATES MATTER? (2008), available at http://www.urban.org/uploadedpdf/411603_individual_mandates.pdf.

analyses.²⁰ The only large-scale American effort to implement such a requirement has been in Massachusetts and the experience there supports these points.²¹ Furthermore, Massachusetts has recently published data on its well-regarded reform efforts which indicate that not only is the requirement crucial, but 25% fewer people were subject to its penalty in 2008 than in 2007, and the amount who ultimately did not obtain insurance, despite its affordability, represented only 1.3% of all taxpayers.²² The Findings specifically note that the requirement in Massachusetts built upon, strengthened, and expanded the existing private employer-based health insurance system.²³

Given Congress' well-supported judgment that mandatory health insurance is essential for making effective the scheme for health care reform established by the bill, there can be no serious question that the individual mandate is "plainly adapted" to the ends promoted by the legislation. All the post-New Deal cases cited by opponents in which the Supreme Court has resolved contested exercises of Congress' Commerce Clause authority have involved matters on the periphery of that authority – intrastate activities, non-economic activities, or other activities alleged not to have a "substantial effect" on interstate commerce, such as those at issue in *Lopez* and *Morrison*. But this is not such a situation. Health insurance is "in" interstate commerce, nowhere near its periphery. But even if (contrary to established law and plain fact) that were not the case, the individual mandate would nevertheless be well within Congress' authority. As Justice Scalia observed in his 2005 concurring opinion in *Gonzales v. Raich*, "Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those interstate activities that do not themselves substantially affect interstate commerce."²⁴ In elaborating this critical dimension of Congress' expansive necessary and proper authority, Justice Scalia referenced (*Id.* at 36) Chief Justice Rehnquist's opinion for the Court in *Lopez*:

Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as "an essential part of a larger regulation of economic activity, in which the

²⁰ As pithily explained by Washington Post health policy expert Ezra Klein: "Pick your favorite system. Socialized medicine in Britain. Single-payer in Canada. Multi-payer with a government floor in France. Private plans with heavy public regulation in Sweden, Germany and elsewhere. None of these plans are 'voluntary.' In some, there's an individual mandate forcing you to pay premiums to insurance companies. In some, there's a system of taxation forcing you to pay premiums to the government. In all of them, at least so far as I know, participation is required except in very limited and uncommon circumstances. And there's a reason for that: No universal system can work without it." Ezra Klein, *The Importance of the Individual Mandate*, WASHINGTON POST, December 16, 2009, available at http://voices.washingtonpost.com/ezra-klein/2009/12/draft_1.html.

²¹ Editorial, *Mass. Bashers Take Note: Health Reform is Working*, BOSTON GLOBE, Aug. 5, 2009, available at http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2009/08/05/mass_bashers_take_note_health_reform_is_working/; Sharon K. Long and Paul B. Masi, *Access and Affordability: An Update on Health Reform in Massachusetts, Fall 2008*, HEALTH AFFAIRS, May 28, 2009, available at <http://content.healthaffairs.org/cgi/reprint/28/4/w578?ijkey=kq.AY AeHKJBb6&keytype=ref&siteid=healthaff>

²² MASSACHUSETTS DEPARTMENT OF REVENUE, INDIVIDUAL MANDATE 2008 PRELIMINARY DATA ANALYSIS (2009), available at http://www.mass.gov/?pageID=dormodulechunk&L=1&L0=Home&sid=Ador&b=terminalcontent&f=dor_news_pressreleases_2009_Insur_mandate_08_draftpenguidelines_2010&csid=Ador

²³ H.R. 3590, 111th Cong. § 1501(a)(2)(D) (2009)

²⁴ *Gonzalez v. Raich*, 545 U.S. 1, 35 (2005)

regulatory scheme would be undercut unless the intrastate activity were regulated.”²⁵

Of course, to pass constitutional muster in the courts, Congress need not conclusively prove that it has selected a perfect option, or the best option; it need demonstrate only that it has a “rational basis” for the manner in which it designs means to attain lawful statutory goals.²⁶ In the health care reform legislation, Congress has plainly more than met that standard, in determining that its “regulatory scheme would be undercut” unless the individual mandate is included.

B. Opponents’ Labeling of Decisions not to Purchase Insurance as “Inactivity” Does Not Defeat Congress’ Commerce Clause Authority to Require Health Insurance.

Opponents are aware that, as the Federalist Society’s issue paper on the subject acknowledges, “An ‘individual mandate’ to buy health insurance has been a component of most health care reform plans proposed over the years, starting with President Bill Clinton’s 1993 health care reform proposal.”²⁷ Indeed, during that lengthy period of spirited legal and policy disputes about health care reform, the suggestion that the principal template for reform might be *unconstitutional* was never heard, until months into the congressional consideration of the current legislation in 2009. In claiming to have found a constitutional flaw in the logically tight and empirically well-supported link between the individual mandate and lawful goals of a lawful program, opponents’ arguments boil down to a single assertion: that a decision not to purchase or maintain health insurance, which the mandate prohibits, is “inactivity,” not activity at all, and hence not an activity in or affecting interstate commerce:

By its own plain terms, the individual mandate provision regulates no action. To the contrary, it purports to “regulate” inactivity by converting the inactivity of not buying insurance into commercial activity. Proponents of the individual mandate are contending that, under its power to “regulate commerce . . . among the several states,” Congress may reach the doing of nothing at all!²⁸

This “inactivity” claim is empty verbal gimmickry. Individuals who go without health insurance – if health insurance is available to them and affordable, a contingency that the legislation goes to great lengths to eliminate – are not “doing nothing.” They are deciding to put off paying for health insurance and for health care – because they believe that they won’t need it

²⁵ *Raich*, 545 U.S. at 36 (quoting *Lopez*, 514 U.S. at 561).

²⁶ *Raich*, 545 U.S. at 22 (citing numerous other Supreme Court precedents) (opinion of the Court by Justice Stevens)

²⁷ Peter Urbanowicz and Dennis G. Smith, *Constitutional Implications of an “Individual Mandate” in Health Care Reform*, FEDERALIST SOCIETY, July 10, 2009, available at http://www.fed-soc.org/doclib/20090710_Individual_Mandates.pdf

²⁸ Randy Barnett, Nathaniel Stewart, and Todd Gaziano, *Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional*, THE HERITAGE FOUNDATION, December 9, 2009, at 1, available at http://s3.amazonaws.com/thf_media/2009/pdf/lm_0049.pdf. To the same effect, see Ken Klukowski, *Mandate Insurance is Unconstitutional*, POLITICO (October 20, 2009), available at <http://www.politico.com/news/stories/1009/28463.html>; David B. Rivkin, Jr. and Lee A. Casey, *Mandatory Insurance is Unconstitutional*, WALL STREET JOURNAL, September 18, 2009, available at <http://online.wsj.com/article/SB10001424052970204518504574416623109362480.html>

until some future date, or because they recognize that, one way or the other, through hospital emergency room care or other means, necessary care will be available if serious illness or an accident strikes. Professor Jack Balkin has characterized such acts as decisions to self-insure.²⁹ As the Senate Findings state, reflecting widespread, well-documented expert analysis as well as experience with existing universal health programs, universal health coverage requires universal buy-in. In effect, Congress has determined that decisions to forego coverage by individuals, most or all of whom will eventually need health care, game the system in such individuals' own perceived short-term interests, narrowly defined. But in the long-run, they make the system more expensive and less effective for themselves as well as the rest of society, and they make the overall statutory program unworkable. The rationality of Congress' judgment on this basic point – if anything, stronger and more direct than regulatory approaches upheld in leading Commerce Clause cases perceived to be close, such as *Gonzales v. Raich*, *Wickard v. Filburn*³⁰, and *Heart of Atlanta Motel, Inc. v. United States*³¹-- cannot be finessed with a misleading label.

In effect, opponents acknowledge that no persuasive argument can be found to rebut Congress' case for the validity of its mandatory insurance provisions. The authors of the Federalist Society paper noted above never actually assert that the mandate is unconstitutional. After setting out – without ever actually endorsing – the various arguments against mandate provisions in the pending House and Senate bills, Messrs. Urbanowicz and Smith merely conclude that:

Reliance on the Commerce Clause to justify the constitutionality of an individual mandate *might be susceptible to an “as applied challenge* from individuals who (1) never access the health care system or (2) are able to pay for their health care without using insurance, because the government could not claim an impact on interstate commerce of providers and insurers as a result of uncompensated care.”³²

Apart from the implicit concession that, on its face the mandate is constitutional under the Commerce Clause, and their identifying only two – very narrow – classes of plaintiffs for “as applied” challenges, they are willing to suggest only that the mandate “might be susceptible” to such claims.³³ Opponents' real grievance is with the state of the law itself, what CATO Institute

²⁹ Professor Balkin's observation appears in a debate with Messrs. Rivkin and Casey, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 148 U.P.A. L. REV. PENNUMBRA 93, 117 (2009), available at <http://www.pennumbra.com/debates/pdfs/HealthyDebate.pdf>

³⁰ 317 U.S. 111 (1942) (Congress authorized to enforce acreage limits to crops grown exclusively for home consumption)

³¹ 379 U.S. 241, 258 (1964) (Upholding prohibition in the Civil Rights Act of 1964 barring hotels and restaurants from refusing to serve customers on grounds of race). Professor Erwin Chemerinsky has noted that this ruling underscores the lack of support in relevant case-law for the activity/non-activity distinction proposed by opponents and on which their entire Commerce Clause case rests. Chemerinsky, *Health Care Reform is Constitutional*, POLITICO, October 23, 2009, available at <http://www.politico.com/news/stories/1009/28620.html>

³² Urbanowicz and Smith, *supra* n. 27, at 4 (emphasis added)

³³ The authors' caution is quite understandable, given that no individual could demonstrate that they will “never” access the health care system. Nor could it be demonstrated that uncompensated care has no effect on the overall health insurance system; the latter argument would appear indistinguishable from the arguments rejected by the Court in *Raich* and *Wickard*. In contrast to the suggestion of Federalist Society authors. Urbanowicz and Smith, the

legal expert Michael Cannon characterizes as “the Supreme Court’s tortured interpretation of the Commerce Clause,” which, he and CATO Board Chair Robert A. Levy grimly acknowledge, permits “[e]ven noncommercial activities within a state [to] be restricted if they threaten to undercut federal regulation of interstate markets.”³⁴

IV. The Provisions of the House and Senate Bills Creating Incentives to Carry Adequate Health Insurance are Lawful Exercises of Congress’ Broad Power to Collect Revenue and Spend for the General Welfare.

In addition to contending that the individual mandate exceeds Congress’ authority to regulate interstate commerce, opponents also claim that the penalties prescribed for violating the insurance requirement, in both the House and Senate bills, exceed Congress’ constitutional taxing authority. This claim does not merit extensive analysis, because there is simply no colorable basis for it.

As noted above, the House bill structures the individual mandate entirely as a tax. Section 501 adds a section (§59B) to the Internal Revenue Code that imposes a tax on individuals who fail to carry specified health insurance coverage of 2.5% of their adjusted gross income above the filing threshold, capped at the national average current annual cost of health insurance premiums for basic individual plans.³⁵ The Senate bill, also as noted above, sets forth an affirmative mandate, termed the “individual responsibility requirement,” and prescribes penalties for noncompliance; the penalties are to be included with the individual’s annual tax return – hence, added to his or her tax for the year. This penalty is capped (at very low levels): \$95 for 2014; \$495 for 2015; \$750 for 2016, adjusted thereafter with a cost-of-living adjustment. Alternatively, an individual who fails to purchase insurance must pay .5 percent of household income for 2014, 1 percent for 2015, and 2 percent thereafter, capped by the cost of the national average premium for a bronze level qualified plan for the relevant family size, if this results in a higher amount.³⁶ In effect, these provisions constitute analogues to the pay-or-play mandates imposed by both the House and Senate bills on employers – which opponents have not challenged on constitutional grounds. It is, frankly, difficult to apprehend how these individual requirements, and the larger packages of incentives and benefits of which it is a part, differs in kind from these and from many existing provisions of the Internal Revenue Code, or why they are incompatible with the long-established judicial precedents that Congress has relied upon in fashioning the nation’s tax system.

Heritage Foundation authors assert that the challenge to the mandate that they contemplate would be a facial, rather than an as-applied claim, and would be *more* likely to succeed for that reason. Barnett, Stewart, and Gaziano, *supra* n. 28, at 11. They note that the Supreme Court has *never* upheld an as-applied Commerce Clause attack on a federal law, most recently rejecting such a challenge in 2005 in *Raich*. *Id.* at 9.

³⁴ Michael F. Cannon, *The Reid Individual Mandate : An Affront to the Constitution*, CATO@LIBERTY December 12, 2009, available at <http://www.cato-at-liberty.org/2009/12/11/the-reid-individual-mandate-an-affront-to-the-constitution/>; Michael F. Cannon and Robert A. Levy, *Bill Reforms Constitution: Congress is Asserting a New, Unauthorized Power to Force Us to Buy Health Insurance*, PHILADELPHIA INQUIRER, December 11, 2009, available at <http://www.philly.com/inquirer/opinion/79034917.html> Likewise, Rivkin and Casey concede the same point, *supra* n. 29, at 112.

³⁵ H.R. 3962, 111th Cong. §501(a) (2009)

³⁶ H.R. 3590, 111th Cong., § 5000A(c) (2009) (as amended by the Manager’s Amendment)

On their face, these mandated payments are straightforward taxes on income. Contrary to what some opponents have suggested, the fact that they have a regulatory purpose is irrelevant for constitutional purposes. At least since 1937, it has been clear that “[A] tax is not any the less a tax because it has a regulatory effect, and . . . an act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax . . . tends to restrict or suppress the thing taxed.”³⁷ In the same vein: “It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxes.”³⁸ As noted above, the mandatory insurance requirements in these bills are well within Congress’ regulatory authority under the Commerce Clause. But even if that were not true, Congress is empowered to enact them pursuant to its taxing and spending powers. Since 1936, it has been established that Congress may exercise its powers to collect revenue and spend for the General Welfare to achieve goals that are not covered by the other powers enumerated in Article I.³⁹ Congress may – though, as noted above, it is not required to – accomplish such results by conditioning the grant of federal funds on compliance with specified requirements.⁴⁰ Indeed, the mandate provisions utilize this approach with respect to those individuals who qualify for subsidies in order to afford mandated insurance payments. Finally, opponents suggest that the taxes associated with the mandate constitute a “direct” tax which, as they interpret the taxation provisions of Article I and the Sixteenth Amendment, must be “apportioned among the states” strictly in accordance with their respective populations. Not since the nineteenth century has the Supreme Court so narrowly or legalistically limited Congress’ taxing authority; Professor Timothy Jost considers it “inconceivable” that the Court would reverse that course over the health care individual mandate. The Court, he explains, has treated only capitation and property taxes as “direct taxes,” and the mandate tax provisions fall within neither category. Instead, they tax “the refusal to purchase insurance, recognizing that individuals who go without insurance impose a burden on society when the uninsured individual ends up receiving “uncompensated care” or being cared for at public expense.”⁴¹

The above constitutional principles have long undergirded Congress’ broad powers to tax and spend for the General Welfare, have been reaffirmed by the courts frequently, and relied upon by Congress pervasively. They are more than adequate to support the taxing and spending provisions that relate to the mandatory insurance requirement in the current health reform bills. As the Congressional Research Service noted earlier this year, “[H]ealth insurance mandate proposals [along the lines of those in the legislation] could rely on Congress’s spending and taxing authority.”⁴² The program created by the legislation leaves no room for doubt about the

³⁷ *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)

³⁸ *United States v. Sanchez*, 340 U.S. 42, 44 (1950)

³⁹ *United States v. Butler*, 297 U.S. 1, 67 (1936). *United States v. Butler*, decided even before the Court altered its perspective on other constitutional issues to accommodate the New Deal, famously resolved the then-century and a half old debate between Alexander Hamilton and James Madison in favor of Hamilton’s view that the scope of the tax-and-spend power was not limited by the other, specifically enumerated Article I powers. *Helvering v. Davis*, 301 U.S. 619, 640 (1937)

⁴⁰ *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (opinion for the Court by Rehnquist, C.J.)

⁴¹ Timothy Jost, *Is it a Tax? Is it Constitutional?*” O’NEILL INSTITUTE LEGAL SOLUTIONS FOR HEALTH REFORM BLOG, available at <http://oneillhealthreform.wordpress.com/2009/10/08/is-it-a-tax-is-it-constitutional/>

⁴² Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis 2* (July 24, 2009)

applicability of this conclusion. As Professor Jack Balkin recently stated in his debate with opponents David Rivkin and Lee Casey:

The individual mandate is part of a comprehensive health care reform proposal that includes employer mandates for coverage, offers numerous tax credits and tax deductions to small businesses and individuals to allow them to purchase health insurance, expands Medicaid to include more Americans who cannot afford insurance, and reforms insurance practices such as denials of insurance for preexisting conditions. Each of these reforms costs the government money either in extra expenditures or in foregone tax revenues. [Taxing] uninsured persons helps recoup some of these costs and raises revenues for the government to pay for its new programs.⁴³

In sum, the similar incentive and contribution provisions structuring the individual mandate in both bills more than satisfies the bedrock threshold, that the authority to determine whether particular objectives or means for achieving them serve the General Welfare, as specified in Article I of the Constitution, “belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power [or] not an exercise of judgment.”⁴⁴

V. No Provision in the Bill of Rights Prevents Congress from Exercising its Commerce Regulatory and Tax-and-Spend Authority to Prescribe Mandatory Health Insurance.

In truth, what drives opponents’ strained attempts to shrink Congress’ Commerce and taxing powers is a libertarian hostility in principle to forcing health insurance on individuals who would prefer to go without it – regardless of the effect such decisions have on the health sector of the national economy or on Congress’ design for regulating that sector. The question arises, is there a constitutional provision that could form the basis for trumping Congress’ regulatory and tax authority? Were there a provision in the Bill of Rights – or elsewhere in the Constitution – that provides a colorable basis for asserting this libertarian interest, opponents would surely invoke it. But they do not, because there is no such provision.

Since 1937 the Supreme Court has never invalidated a federal economic regulation as an unconstitutional deprivation of “liberty” under the Fifth Amendment.⁴⁵ While the Court has held that forcing individuals to accept unwanted medical care can constitute such a “substantive due process violation,”⁴⁶ the individual mandate in the health care reform legislation does not require anyone to accept treatment, only to pay for insurance that would entitle them to treatment if and when they need it and choose it. To uphold such a requirement, unless a right that has

⁴³ Balkin, Rivkin and Casey, *supra* note 29, at 103.

⁴⁴ *Helvering*, 301 U.S. at 640

⁴⁵ MARK A. HALL, GEORGETOWN UNIVERSITY O’NEILL INSTITUTE FOR NATIONAL AND GLOBAL HEALTH LAW, PROJECT ON LEGAL SOLUTIONS IN HEALTH REFORM, *The Constitutionality of Mandates to Purchase Health Insurance*, at 11, available at

http://www.law.georgetown.edu/oneillinstitute/projects/reform/Papers/Individual_Mandates.pdf

⁴⁶ *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990)

been defined as “fundamental” is at stake, Congress need only demonstrate that the challenged requirement is “rational.” The current health care reform mandate amply meets that standard, as noted above.⁴⁷ As noted above, the opponents’ briefs against the mandate avoid making a substantive due process challenge.

Messrs. Urbanowicz and Smith, authors of the Federalist Society issue paper, do suggest that an as-applied challenge “can be expected” on the ground that, “based on individual circumstances,” the requirement to purchase health insurance violates the Fifth Amendment ban on “takings” of private property for a non-public purpose and/or without just compensation.⁴⁸ They express no opinion on the likely disposition of such a challenge. And with good reason. As Professor Hall has noted, the courts have shied away from accepting Takings claims involving government-induced losses of money, except when private money is seized from a discrete and separate account. “Imposing a financial obligation that can be paid out of any source of funds,” he observes, “is indistinguishable from simple taxation, or ordinary regulation. . . .”⁴⁹

In a 1998 decision, five justices – four using a Takings rationale and one (Justice Kennedy) using a substantive due process rationale – struck down a federal law requiring companies formerly in the coal business to fund health insurance for former employees. At first glance, this decision might give some comfort to the notion that a Fifth Amendment taking-based argument could be mounted against the individual mandate. However, in the 1998 case, both opinions supporting its 5-4 result emphasized that they were willing to find constitutional fault only because the law in question shifted costs to a small and discrete set of entities, and, especially, because it did so retroactively so as to defeat justifiable “investment-backed expectations.” Justice O’Connor’s plurality opinion noted that “in the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others.” The Court nevertheless invalidated this particular instance as an uncompensated taking, only because it “imposed severe retroactive liability on a limited class of parties . . . disproportionate to the parties’ experience.”⁵⁰ The statute in the *Apfel* case imposed liability on a company for a business in which it had engaged a quarter century earlier. In contrast, the health reform mandate imposes “costs” (if, indeed, they are net costs or “without compensation” at all, since mandatory payments are exchanged for valuable health insurance) on millions of presently uninsured individuals, many of whom would voluntarily have purchased insurance already, had it been available and affordable. Moreover, the obligation is strictly prospective. In short, opponents can point to no constitutional provision to trump Congress’ straight-forward, black-letter argument – the mandate is a rational means of promoting indisputably “legitimate” statutory goals appropriate for Congress’ broad powers to regulate commerce and tax and spend for the general welfare.

⁴⁷ *Williamson v. Lee Optical Co.*, 56348 U.S. 483, 487-88 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it”), discussed in Hall, *supra* n. 45, at 11.

⁴⁸ Urbanowicz and Smith, *supra* n. 27, at 4

⁴⁹ Mark A. Hall, “Taking” *Legal and Economic Liberties, Seriously?* O’NEILL INSTITUTE LEGAL ISSUES IN HEALTH REFORM BLOG, available at <http://oneillhealthreform.wordpress.com/2009/10/14/%e2%80%9ctaking%e2%80%9d-legal-and-economic-liberties-seriously/>

⁵⁰ *Eastern Enterprises v. Apfel*, 524 U.S. 498, 526-29 (plurality opinion of Justice O’Connor), 538, 548-50 (opinion of Justice Kennedy, concurring in the judgment and dissenting in part).

VI. Conclusion: Mandatory Insurance Is Neither Burdensome nor Unprecedented.

A major reason why all opponents' legal arguments fall short is that they share a common factual foundation, which itself is a fallacy. Their root assumption, or assertion, is that requiring Americans to carry health insurance is both extraordinarily novel – “unprecedented”– and extraordinarily burdensome. But this endlessly repeated assertion is specious, for several reasons:

- To begin with, experience demonstrates that mandatory health insurance is neither unprecedented nor burdensome. Hundreds of millions of millions of individuals live under a variety of mandatory health insurance regimes, with very high rates of compliance and no record of discontent with the requirement, in other advanced economies and, indeed, as noted above, in Massachusetts.
- As noted above, the overwhelming majority of Americans already carry health insurance that satisfies the terms of the mandate, so they will not be affected by the mandate at all. Of the approximately 46 million Americans who currently lack health insurance, the majority are in this state only because it is unavailable or unaffordable, and they of course, will welcome the opportunity presented by the legislation to gain coverage.
- For those currently uninsured Americans who would prefer to forego the cost of coverage, even with whatever level of subsidy they will be in a position to claim, the mandate is no more a burden than the requirement to pay Social Security and Medicare taxes – indeed, it is less, since the coverage they receive in return is available immediately, not when they reach eligibility in their 60s.
- By conceding that social and health insurance taxes are constitutionally valid restrictions on individual liberty, while condemning functionally equivalent contributions to private insurers, opponents effectively contend that a single-payer, government-run program like Medicare is the *only* type of universal health insurance system Congress may establish. The Constitution surely does not impose such an arbitrary strait-jacket on Congress.
- The great majority of Americans live in jurisdictions that require the purchase of automobile insurance. Health care reform opponents claim that these state mandatory auto insurance regimes are not “precedents” for federal mandatory health insurance, for a variety of essentially legalistic reasons. For example, they assert that auto insurance is a voluntary payment in exchange for a “privilege,” permission to drive on public roads. But for most people, driving is an economic necessity. In terms of its actual impact on people, mandatory auto insurance is a common-sense indicator of whether the public would find novel or inherently burdensome a mandate to purchase health insurance from the private insurance industry.

- If, as opponents claim, the burden of mandatory health contributions was – *in principle* – oppressive and unfair, Medicare, and for that matter Social Security taxes would raise constitutional questions no less than if these landmark statutory programs were cast as regulations of interstate commerce. In fact, of course, since 1937, such questions have never been raised either in the courts or in Congress. The reason is simple: *most people regard these mandatory contributions – in light of what they expect to receive in exchange – as a bargain not a burden.*