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Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional

Randy Barnett, Nathaniel Stewart, and Todd Gaziano

As the Congressional Budget Office explained: “A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States.” Yet, all of the House and Senate health-care bills being debated require Americans to either obtain or purchase expensive health insurance, estimated to cost up to \$15,000 per year for a typical family, or pay substantial tax penalties for not doing so.

The purpose of this compulsory contract, coupled with the arbitrary price ratios and controls, is to require some people to buy artificially high-priced policies as a way of subsidizing coverage for others and an industry saddled with the costs of other government regulations. Rather than appropriate funds for higher federal health-care spending, the sponsors of the current bills are attempting, through the personal mandate, to keep the forced wealth transfers entirely off budget.

This takes congressional power and control to a strikingly new level. An individual mandate to enter into a contract with or buy a particular product from a private party is literally unprecedented, not just in scope but in kind, and unconstitutional either as a matter of first principles or under any reasonable reading of judicial precedents.

The Commerce Clause. Advocates of the individual mandate have claimed that the Supreme Court’s Commerce Clause jurisprudence leaves “no

doubt” that the insurance requirement is a constitutional exercise of that power. They are wrong.

Although the Supreme Court has upheld some far-reaching regulations of economic activity, most notably in *Wickard v. Filburn* and *Gonzales v. Raich*, neither case supports the individual health insurance mandate. In these cases, the Court held that Congress’s power to regulate the interstate commerce in a fungible good—for example, wheat or marijuana—as part of a comprehensive regulatory scheme included the power to regulate or prohibit the intrastate possession and production of this good. In both cases, Congress was allowed to reach intrastate economic activity as a means to the regulation of interstate commerce in goods.

Yet, the mandate to purchase health insurance is not proposed as a means to the regulation of interstate commerce; nor does it regulate or prohibit activity in either the health insurance or health care industry. Indeed, *the health care mandate does not purport to regulate or prohibit activity of any kind, whether economic or noneconomic.* By its own plain terms, the individual mandate provision regulates no action. To the contrary, it purports to “regulate”

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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!

In recent years, the Court invalidated two congressional statutes that attempted to regulate non-economic activities. In *United States v. Lopez* (1995), it struck down the Gun-Free School Zones Act, which attempted to reach the activity of possessing a gun within a thousand feet of a school. In *United States v. Morrison* (2000), it invalidated part of the Violence Against Women Act, which regulated gender-motivated violence. Because the Court found the regulated activity in each case to be non-economic, it was outside the reach of Congress’s Commerce power, regardless of its effect on interstate commerce.

To uphold the insurance purchase mandate, the Supreme Court would have to concede that the Commerce Clause has no limits, a proposition that it has never affirmed, that it rejected in *Lopez* and *Morrison*, and from which it did not retreat in *Raich*. Although Congress may possibly regulate the operations of health care or health insurance companies directly, given that they are economic activities with a substantial effect on interstate commerce, it may not regulate the individual’s decision not to purchase a service or enter into a contract.

If Congress can mandate this, then it can mandate anything. Congress could require every American to buy a new Chevy Impala every year, or a pay a “tax” equivalent to its blue book value, because such purchases would stimulate commerce and help repay government loans. Congress could also require all Americans to buy a certain amount of wheat bread annually to subsidize farmers.

Even during wartime, when war production is vital to national survival, Congress has never claimed such a power, nor could it. No farmer was

ever forced to grow food for the troops; no worker was forced to build tanks. And what Congress cannot do during wartime, with national survival at stake, it cannot do in peacetime simply to avoid the political cost of raising taxes to pay for desired government programs.

Other Constitutional Problems. Senators and Representatives should also know that:

- There are four constitutionally relevant differences between a universal federal mandate to obtain health insurance and the state requirements that automobile drivers carry liability insurance for their injuries to others on public roads;
- A review of the tax provisions in the House and Senate bills raises serious questions about the constitutionality of using the taxing power in this manner; and
- Since there literally is no legal precedent for this decidedly unprecedented assertion of federal power, it is highly unlikely that the Supreme Court would break new constitutional ground to save an unpopular personal mandate.

Members of Congress have a responsibility, pursuant to their oath, to determine the constitutionality of legislation independently of how the Supreme Court has ruled or may rule in the future. But Senators and Representatives also should know that, despite what they have been told, the health insurance mandate is highly vulnerable to challenge because it is, in truth, unconstitutional. And all other considerations aside, the highest obligation of each Member of Congress is fidelity to the Constitution.

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Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional

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A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An individual mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Second, it would require people to purchase a specific service that would be heavily regulated by the federal government.¹

This statement from a 1994 Congressional Budget Office Memorandum remains true today. Yet, all of the leading House and Senate health-care reform bills being debated in Congress require Americans to either secure or purchase health insurance with a particular threshold of coverage, estimated by CBO to cost up to \$15,000 per year for a typical family.² This personal mandate to enter into a contract with a private health insurance company is enforced through civil and criminal tax penalties in section 501 of the House bill³ and with a freestanding mandate and equally questionable civil tax penalties in sections 501 and 513 of the pending Senate bill.⁴

The purpose of this compulsory contract, coupled with the arbitrary price ratios and controls, is to require many people to buy artificially high-priced policies to subsidize coverage for others as well as an industry saddled with other government costs and regulations. Congress lawfully could enact a general tax to pay for these subsidies or it could create a tax

Talking Points

- The federal government has never required all Americans to buy any good or service. The individual health insurance mandate is truly unprecedented. The state requirement that drivers carry liability insurance for their injuries to others on the public roads is constitutionally different for four reasons.
- The Supreme Court's most expansive rulings on Congress's power do not support the individual health insurance mandate.
- The mandate to buy health insurance does not regulate the health care or insurance markets; it regulates the doing of nothing. If Congress really had the power to regulate such *inactivity*, there would be no limit to its power. Congress could mandate the purchase of anything. Yet, the Supreme Court recently made it clear it will strike down federal statutes based on such an unlimited assertions of power.
- Senators' and Representatives' highest obligation is fidelity to the Constitution, which does not allow a personal health insurance mandate.

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credit for those who buy health insurance, but that would require Congress to “pay for” or budget for the subsidies in a conventional manner. The sponsors of the current bills are attempting, through the personal mandate, to keep the transfers entirely off budget or—through the gimmick of unconstitutional taxes or penalties they dub “shared responsibility payments”—make these transfers appear to be revenue-enhancing.

All of the leading House and Senate health-care reform bills being debated in Congress require Americans to either secure or purchase health insurance with a particular threshold of coverage.

This “personal responsibility” provision of the legislation, more accurately known as the “individual mandate” because it commands all individuals to enter into a contractual relationship with a private insurance company, takes congressional power and control to a striking new level. Its defenders have struggled to justify the mandate by analogizing it to existing federal laws and court decisions, but their efforts do not withstand serious scrutiny. An individual mandate to enter into a contract with or buy a particular product from a private party, with tax penalties to enforce it, is unprecedented—not just in scope but in kind—and unconstitutional as a matter of first principles and under any reasonable reading of judicial precedents.

Congress has a responsibility, pursuant to the oath of all Senators and Representatives, to determine the constitutionality of its own actions independently of how the Supreme Court has previously ruled or may rule in the future. But it is very unlikely that the Court would extend current constitutional doctrines, or devise new ones, to uphold this new and unprecedented claim of federal power.

Constitutional Overview

In reaction to states that were enacting trade barriers and violating the rights of their citizens, those who drafted and ratified the U.S. Constitution were determined both to constrain the powers of states and, at the same time, limit the power of Congress. They designed an ingenious system of checks and balances that divides state and federal authority in the hope of preventing any one government from exerting too much control over a free people.⁵ To that end, the Constitution creates a national government with a legislature of limited and enumerated powers. Article I allocates to Congress “[a]ll legislative powers *herein granted*,”⁶ which means that some legislative powers remain beyond Congress’s reach. The Constitution’s Necessary and Proper Clause similarly grants Congress the power “[t]o make all laws which shall be necessary and proper for carrying into execution *the foregoing powers*, and all other powers *vested by this Constitution* in the government of the United States, or in any department or officer thereof.”⁷

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1. CONGRESSIONAL BUDGET OFFICE, THE BUDGETARY TREATMENT OF AN INDIVIDUAL MANDATE TO BUY HEALTH INSURANCE, (1994) available at <http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf>.
 2. Letter from Douglas Elmendorf, Director, Congressional Budget Office, to Rep. Charles Rangel (Nov. 2, 2009).
 3. Affordable Health Care for America Act, H.R. 3962, 111th Cong. (2009). See Brian Walsh & Hans von Spakovsky, *Criminalizing Health-Care Freedom*, NATIONAL REVIEW ONLINE, Nov. 19, 2009, <http://article.nationalreview.com/?q=MjVjY2FmYmE3MTQwNmNlYWwRIMzE4YTc5NGQ4OGJkMmM=>.
 4. Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2009). The Senate took up a different House-passed bill and then amended it with substitute language that is now being debated.
 5. The Separation of Powers was designed to function in a similar and complementary way to better protect individual liberty. See THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

6. U.S. CONST. art. I, § 1 (emphasis added). The executive and judicial powers delegated in Articles II and III, respectively, contain no such qualification.

The Supreme Court recognized and affirmed this fundamental principle from the earliest days of the republic, as Chief Justice Marshall famously observed: “The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”⁸ And in his canonical opinion interpreting the Necessary and Proper Clause, Chief Justice Marshall insisted that “should Congress, *under the pretext of executing its powers*, pass laws for the accomplishment of objects not entrusted to the [national] government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.”⁹

Nowhere in the Constitution is Congress given the power to mandate that an individual enter into a contract with a private party or purchase a good or service and, as this paper will explain, no decision or present doctrine of the Supreme Court justifies such a claim of power. Therefore, because this claim of power by Congress would literally be *without precedent*, it could only be upheld if the Supreme Court is willing to create a new constitutional doctrine. This memorandum explains why the two powers cited by supporters of this bill—the power of Congress to regulate interstate commerce and the power of Congress to tax—do not justify an individual mandate, even under the most expansive readings given these powers by the Supreme Court. In particular, this paper addresses four topics that have not yet been given adequate consideration by Congress and most, if not all, of the commentators:

- First, most arguments, either favoring or opposing the individual mandate, do not discuss the Supreme Court’s “class of activities” test, which it has applied in every relevant Commerce

An individual mandate to enter into a contract with or buy a particular product from a private party, with tax penalties to enforce it, is unprecedented—not just in scope but in kind—and unconstitutional as a matter of first principles and under any reasonable reading of judicial precedents.

Clause case. This paper addresses this oversight and argues that, despite the broad congressional power to regulate interstate commerce, the individual mandate provision fails this test and is unlikely to survive the Court’s review.

- Second, this paper addresses the common, but mistaken, suggestion that a universal federal mandate to obtain health insurance is no different than a state requiring its licensed automobile drivers to have liability insurance for their injuries to others.
- Third, this paper analyzes claims arising under the Taxing Clause. A preliminary review raises serious questions about the constitutionality of using the taxing power in this manner.
- And finally, this paper explains why it is highly unlikely that the Supreme Court would break new constitutional ground to save this unpopular personal mandate.

The Interstate Commerce Clause

Advocates of the individual mandate, like Speaker Nancy Pelosi (D–CA) and law professor Erwin Chemerinsky, have claimed that the Supreme Court’s “Commerce Clause” jurisprudence leaves “no doubt” that the insurance requirement is a constitutional exercise of that power.¹⁰ They are wrong.

7. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

8. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824) (noting that the Constitution “contains an enumeration of powers expressly granted by the people to their government”).

9. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (emphasis added). See Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. OF CONST. L. 185 (2003) for a discussion of the original meaning of the Clause.

10. See e.g. Erwin Chemerinsky, *Health Care Reform is Constitutional*, POLITICO, Oct. 23, 2009, <http://www.politico.com/news/stories/1009/28620.html>. See also Ruth Marcus, *An ‘Illegal’ Mandate? No*, WASH. POST, Nov. 27, 2009 (making similar conclusory arguments).

The Commerce Clause, set forth in Article I, section 8, grants Congress the authority “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”¹¹ From the Founding, both Congress and the Supreme Court have struggled to define the limits of that authority, but it has always been understood that

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some limit exists beyond which Congress may not go. To be sure, the Supreme Court has been deferential to congressional claims of authority to regulate commerce since 1937. Yet, even as it allowed Congress to exercise expansive powers over the national economy, the New Deal Supreme Court declared that:

The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce “among the several States” and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.¹²

As the Congressional Research Service has recognized, the individual mandate could face a variety of constitutional obstacles, especially under the Commerce Clause:

Despite the breadth of powers that have been exercised under the Commerce Clause,

it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance. Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as *it is a novel issue* whether Congress may use this clause to require an individual to purchase a good or a service.¹³

Another word for “novel” is *unprecedented*, which is literally true: There is simply no legislative or judicial precedent for this claim of congressional power. In the absence of binding judicial precedent, however, the current Supreme Court is unlikely to stretch the commerce power even further than it already has.

The Supreme Court’s “Class of Activities” Test

In the last seventy years, the Supreme Court has applied a relatively straightforward judicial test to determine whether a federal statute is within the commerce power of Congress. When evaluating a claim of power under the Commerce Clause, the Court proceeds with a two-pronged inquiry. First, the Court determines whether the *entire class of regulated activity* is within Congress’s constitutional reach; and second, whether the petitioner is a member of that class.

A long line of Supreme Court cases establishes that Congress may regulate three categories of activity pursuant to the commerce power. These categories were first summarized in *Perez v. United States*,¹⁴ and most recently reaffirmed in *Gonzales v. Raich*.¹⁵ First, Congress may regulate the “channels of interstate or foreign commerce” such as the regulation of steamship, railroad, highway, or air-

11. U.S. CONST. art. I, § 8, cl. 3. See also Randy E. Barnett, *The Original Meaning of the Commerce Clause*, at 146 for discussion of the original public meaning of the Clause.

12. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

13. Jennifer Staman & Cynthia Brougher, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, Congressional Research Service Report for Congress, July 24, 2009 (emphasis added).

14. See *Perez v. United States*, 402 U.S. 146, 150 (1971).

15. *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005).

This claim of power by Congress would literally be without precedent, and therefore it could only be upheld if the Supreme Court is willing to create a new constitutional doctrine.

craft transportation or prevent them from being misused, as, for example, the shipment of stolen goods or of persons who have been kidnapped. Second, the commerce power extends to protecting “the instrumentalities of interstate commerce,” as, for example, the destruction of an aircraft, or persons or things in commerce, as, for example, thefts from interstate shipments.”¹⁶ Third, Congress may regulate economic activities that “substantially affect interstate commerce.”¹⁷

Under the first prong of its Commerce Clause analysis, the Court asks whether the class of activities regulated by the statute falls within one or more of these categories. Since an individual health insurance mandate is not even arguably a regulation of a channel or instrumentality of interstate commerce, it must either fit in the third category or none at all. Predictably, Congress has cited only this third basis. The Senate bill asserts (erroneously) that: “[t]he individual responsibility requirement...is commercial and economic in nature, and substantially affects interstate commerce.... The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.”¹⁸

The second prong of the Court’s Commerce Clause analysis requires a determination that the petitioner has in fact engaged in the regulated activity, making him or her a member of the regulated class. In its modern Commerce Clause cases, the Supreme Court rejects the argument that a peti-

tioner’s own conduct or participation in the activity is, by itself, either too local or too trivial to have a substantial effect on interstate commerce. Rather, the Court has made clear that, “where the class of activities is regulated and that class is within the reach of federal power, the courts have no powers ‘to excise, as trivial, individual instances’ of the class.”¹⁹ Thus, for example, a potential challenger of the proposed mandate could not argue that because her own decision not to purchase the required insurance would have little or no effect on the broader market, the regulation could not be constitutionally applied to her. The Court will consider the effect of the relevant “class of activity,” not that of any individual member of the class.

To assess the constitutionality of a claim of power under the Commerce Clause, the primary question becomes, “what class of activity is Congress seeking to regulate?” Only when this question is answered can the Court assess whether that class of activity substantially affects interstate commerce. Significantly, the mandate imposed by the pending bills does not regulate or prohibit the economic activity of providing or administering health insurance. Nor does it regulate or prohibit the economic

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activity of providing health care, whether by doctors, hospitals, pharmaceutical companies, or other entities engaged in the business of providing a medical good or service. Indeed, *the health care mandate does not purport to regulate or prohibit activity of any kind, whether economic or noneconomic.* To the contrary, it purports to “regulate” inactivity.

16. *Perez*, 402 U.S. at 150.

17. *Raich*, 545 U.S. at 16.

18. H.R. 3590, Subtitle F—Shared Responsibility for Health Care § 1501(a)(1)-(2)(A)(emphases added). The Supreme Court makes its own judgment about such claims, as it did when it struck down part of the Violence Against Women Act, which was supported by detailed findings and a voluminous record attempting to show the economic costs of gender violence. See *infra* note 28 and accompanying text.

19. *Perez*, 402 U.S. at 154.

Proponents of the individual mandate are contending that, under its power to “regulate commerce...among the several states,” Congress may regulate the doing of nothing at all! In other words, the statute purports to convert inactivity into a class of activity. By its own plain terms, the individual mandate provision regulates the absence of action. To uphold this power under its existing doctrine, the Court must conclude that an individual’s failure to enter into a contract for health insurance is an activity that is “economic” in nature—that is, it is part of a “class of activity” that “substantially affects interstate commerce.”

Never in this nation’s history has the commerce power been used to require a person who does nothing to engage in economic activity. Therefore, no decision of the Supreme Court has ever upheld such a claim of power. Such a regulation of a “class of inactivity” is of a wholly different kind than any at issue in the Court’s most expansive interpretations of the Commerce Clause. A mandate to enter into a contract with an insurance company would be the first use of the Commerce Clause to universally mandate an activity by all citizens of the United States.

A mandate to enter into a contract with an insurance company would be the first use of the Commerce Clause to universally mandate an activity by all citizens of the United States.

Today, even voting is not constitutionally mandated. But, if this precedent is established, Congress would have the unlimited power to regulate, prohibit, or mandate any or all activities in the United States. Such a doctrine would abolish any limit on federal power and alter the fundamental relationship of the national government to the states and the people. For this reason it is highly doubtful that the Supreme Court will uphold this assertion of power.

The Supreme Court’s Most Expansive Precedents: *Wickard* and *Raich*

To show that such a claim of power is literally without precedent, this paper will now turn to the two Supreme Court decisions that are universally acknowledged as the most expansive interpretations of the Commerce Clause to date: the 1942 case of *Wickard v. Filburn*²⁰ and the 2005 decision in *Gonzales v. Raich*.²¹ Neither case supports the individual mandate.

Wickard v. Filburn, widely regarded as a watershed expansion of the Commerce Clause power, upheld regulations under the Agricultural Adjustment Act of 1938, which, in an effort to avoid wheat surpluses and boost prices, controlled the volume of wheat sold in interstate commerce. Under the regulation, farmer Roscoe Filburn had been allocated 11 acres for his wheat crop, but instead he planted an extra 12 acres of wheat to consume on his own farm. Filburn argued that Congress’s power to regulate the interstate wheat market did not include wheat that was not commercially traded, but was to be consumed on his own farm.²²

The *Wickard* Court rejected this contention because the class of activity being regulated was wheat production. As a wheat grower, farmer Filburn was a willing, participating member of that class, and could be barred from growing more wheat than his allotment, regardless of how he planned to use it. Unlike farmer Filburn, however, those who decide *not* to purchase health insurance have not engaged in a commercial activity. Indeed, they have chosen to *abstain* from engaging in economic activity.

In passing the Agricultural Adjustment Act of 1938, Congress only claimed the power to regulate commercial farmers, like Roscoe Filburn, who engage in the activity of growing wheat as part of an interstate market. The statute even exempted small farms. Congress’s current effort to compel all Americans to buy health insurance, whether they

20. 317 U.S. 111 (1942).

21. *Raich*, 545 U.S. at 16–17.

22. *Wickard*, 317 U.S. at 118.

want to or not, is tantamount to the Agricultural Adjustment Act requiring each American, rural and city dwellers alike, to grow a particular amount of wheat. After all, the refusal to grow any share of wheat could be said to place the burden of wheat production on others and thereby limit the country's wheat supply. Such a limitation would, in turn, substantially affect the commercial market. Therefore, using the same logic underpinning the personal health insurance mandate, Congress can compel every American to grow his or her own wheat to ensure a greater supply to meet the public's demand. Or, conversely, Congress can simply "mandate" that every American buy two loaves of wheat bread each week, thereby ensuring a higher, more consistent demand and price for farmer Filburn's wheat crop.

By boldly asserting that the authority to regulate interstate commerce includes the power to regulate not merely voluntary activity that is commercial or even ancillary thereto, but *inactivity* that is expressly designed to avoid entry into the relevant market, this theory effectively removes any boundaries to Congress's commerce power—Congress could mandate anything. Under this theory, given that the American auto industry is a highly regulated commercial activity in the national marketplace (in which the federal government has invested), Congress could constitutionally require every American to buy a new Chevy Impala every year, or a pay a "tax" equivalent to its blue book value.

Even in wartime, when the production of materiel is crucial to national survival, Congress has never claimed such a power. For example, during World War II, no farmer was forced to grow food for the troops; no worker was forced to build tanks. While the federal government encouraged the public to buy its bonds to finance the war effort, it never mandated they do so. While Congress levied a military draft, it did so as necessary and proper to its enumerated power in Article I, sec. 8 "to raise and support armies," not its commerce power. What Congress did not and cannot do during a wartime emergency, with national survival at stake, it cannot do in peacetime simply to avoid the polit-

ical cost of raising taxes to pay for new government programs.

By boldly asserting that the authority to regulate interstate commerce includes the power to regulate not merely voluntary activity that is commercial or even ancillary thereto, but inactivity that is expressly designed to avoid entry into the relevant market, this theory effectively removes any boundaries to Congress's commerce power—Congress could mandate anything.

More recently, in *Gonzales v. Raich*, the Supreme Court considered the power of Congress under the Commerce Clause to regulate the cultivation and possession of home-grown marijuana that is neither sold nor bought and is authorized by state law for medical use. In upholding the constitutionality of the Controlled Substances Act, the Court considered this activity to be strikingly similar to that involved in *Wickard*:

Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . ." and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets.²³

As in *Wickard*, the regulated class of activity was the production of a "fungible commodity," and the Court refused to "excise, as trivial," the *de minimis* nature of Angel Raich's medicinal marijuana plants, or carve out from the class a subset of medical marijuana cultivation in states that permitted this use. Indeed, the Court rested its decision, in part, on the economic nature of the class of activities being reached by the statute:

23. *Raich*, 545 U.S. at 18–19.

[T]he activities regulated by the CSA are *quintessentially economic*. “Economics” refers to “the production, distribution, and consumption of commodities.” Webster’s Third New International Dictionary (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.²⁴

Having found the activities in question to be economic, the Court then accepted the government’s contention that the intrastate subset of this class of activity could not be separated from the larger class: “One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance.”²⁵ In short, because the Court in *Raich* found *both* that the production of marijuana, like the production of wheat, was an economic activity, and that Congress had power to regulate or prohibit this *entire class* of activities, it denied the constitutional challenge.

To uphold the constitutionality of a health care mandate under the authority of *Raich*, the Court would have to find that a decision *not* to enter into a contract to purchase a good or service was an economic activity that, in the aggregate, substantially affects interstate commerce. Before so concluding it would immediately be apparent to the Justices that, by this reasoning, *every* action or inaction could be characterized as “economic” thus destroying any limitation on the commerce power of Congress. It is a safe bet that any argument that leads to a conclusion that Congress has an effectively unlimited police power akin to that of states will be rejected by this Supreme Court. As the Court stated in the 1995 case of *United States v. Lopez*:

To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local.... This we are unwilling to do.²⁶

Nothing about the Court’s current composition suggests it would now be any more receptive to an argument that eliminates all limits on the commerce power.

Moreover, the specific type of legal challenge in *Raich* was constitutionally distinct. The litigants in *Raich* did not challenge the CSA on its face as an unconstitutional exercise of congressional authority. Rather, as the Court noted, “respondents’ challenge is actually quite limited; they argue that the CSA’s categorical prohibition of the manufacture and possession of marijuana *as applied* to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress’ authority under the Commerce Clause.”²⁷ Thus, *Raich* addressed an “as-applied” challenge to the CSA, which sought to carve out a subset “class” of state authorized cultivation and possession of marijuana for medical purposes that was insulated from the national market. Instead, the Court found that the relevant “class of activity” in *Raich* was the entire national market in narcotics

24. *Id.* at 25 (emphasis added).

25. *Id.* at 28.

26. *United States v. Lopez*, 514 U.S. 549, 567 (1995).

27. *Raich*, at 15 (emphasis added).

and controlled substances—and no one disputed Congress’s authority to regulate this class of economic activities. The Supreme Court refused to carve out the proposed subset of this class for separate consideration.

To uphold the constitutionality of a health care mandate under the authority of Raich, the Court would have to find that a decision not to enter into a contract to purchase a good or service was an economic activity that, in the aggregate, substantially affects interstate commerce—reasoning which would destroy any limitation on the commerce power of Congress.

By contrast, a constitutional challenge to a health insurance mandate would not be “as-applied,” as it was in *Raich*, but would challenge Congress’s authority to regulate the entirety of this statutorily defined “class of (in)activity”—that is, the individual citizen’s choice to *refrain from* engaging in an economic activity. Unlike an as-applied challenge, which requires the Court to second guess the “class of activities” defined by Congress, a facial challenge assumes the definition of the class of activities in the statute and denies that this class is within the power of Congress to reach.

While the Court has never upheld an as-applied Commerce Clause challenge, in recent years it did sustain two facial challenges—that is, challenges alleging that provisions or bills are unconstitutional under all circumstances—to statutes that attempted to regulate classes of activities that were beyond the power of Congress to enact. In 1995, in *Lopez*, it upheld a facial challenge to the Gun-Free School Zone’s Act, which attempted to reach the activity of possessing a gun within a thousand feet of a school. And again in 2000, in *United States v. Morrison*,²⁸ it upheld a facial challenge to the Violence Against Women Act, which attempted to reach the activity of gender-motivated violence. In each case, the Court found the class of activities regulated by the

statute was noneconomic and, therefore, outside the reach of the commerce power of Congress, *regardless of its effect on interstate commerce*.

Because the personal insurance mandate purports to reach the refusal to engage in economic activity—which is both inactivity and noneconomic—the Supreme Court could not uphold this exercise of power without admitting that the Commerce Clause has no limits, a proposition it rejected in *Lopez* and *Morrison*, and from which it did not retreat in *Raich*. Although Congress may possibly regulate the health care industry or the health insurance industry in light of their substantial effect on interstate commerce, the individual mandate regulates the noneconomic inactivity of not purchasing a particular service or entering into a contract.

Both *Lopez* and *Raich* acknowledged that Congress could include in the “class of activities” it seeks to regulate some purely local activity it could not otherwise reach if it is essential to a larger regulatory scheme that this intrastate activity be included *in the class*. The actual language in *Raich* noted that the CSA was a “detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of ‘controlled substances.’”²⁹ In short, the Court refused to carve out a subset from a “class of activities” when doing so might “undercut” a comprehensive regulatory scheme. Therefore, Congress may reach even small-scale wholly intrastate production and possession of a good as part of a comprehensive scheme to regulate the interstate commerce in that good. However, just because Congress can or does regulate an entire class of activity or industry “comprehensively” (including some arguably local activity), it does not follow that it can regulate and control *every other* type of behavior that may affect this class or industry. In the words of the Court in *Morrison*, this “method of reasoning” should be “rejected as unworkable if we are to maintain the Constitution’s enumeration of powers.”³⁰

28. *United States v. Morrison*, 529 U.S. 598, 617 (2000).

29. *Raich*, 545 U.S. at 18–19 (emphasis added).

Although a refusal to engage in economic activity may ultimately have a ripple effect on the marketplace, the noneconomic activities of possessing a gun near a school or gender-based violence—activities which occur throughout the nation—had the same secondary effects. Nevertheless, refusing to “pile inference upon inference,” the Court sustained facial challenges to both statutes on the ground that the class of activities was outside the commerce power of Congress. Every decision a consumer makes undoubtedly ripples through the broader economic pool; and, in the aggregate, consumer decisions create the national marketplace. Yet this reasoning has never been used to place each individual consumer decision within the purview of federal regulation. Simply because Congress can regulate wheat production under the Agricultural Adjustment Act does not entail that Congress can require every American to buy boxes of Shredded Wheat cereal on the grounds that, by *not* buying wheat cereal, *non-consumers* were adversely affecting the regulated wheat market.

Just because Congress can or does regulate an entire class of activity or industry “comprehensively” (including some arguably local activity), it does not follow that it can regulate and control every other type of behavior that may affect this class or industry.

Law professor Erwin Chemerinsky has speculated that the Supreme Court’s civil rights decisions in *Heart of Atlanta Motel v. United States*³¹ and *Katzenbach v. McClung*³² would permit Congress to regulate economic “inactivity”: “Congress can use its commerce power to forbid hotels and restaurants from discriminating based on race,” he con-

tends, “even though their conduct was refusing to engage in commercial activity.”³³ At issue in *Heart of Atlanta Motel*, however, was whether “racial discrimination *by motels* affected commerce.”³⁴ As the Court explained in *Perez*:

It was the “class of activities” test which we employed in *Heart of Atlanta Motel, Inc. v. United States*, to sustain an Act of Congress requiring hotel or motel accommodations for Negro guests. The Act declared that “any inn, hotel, motel, or other establishment which provides lodging to transient guests’ affects commerce per se.” That exercise of power under the Commerce Clause was sustained.³⁵

Under the civil rights acts upheld by the Court, no person was mandated to operate a motel. But, as with any economic regulation, anyone who chose to operate a motel—a quintessential economic activity—had to play by certain rules set by Congress. Similarly, *Katzenbach* concerned the federal rule against racial discrimination by anyone who chose to operate a restaurant, another economic activity. The class of regulated activity upheld in these cases was the operation of motels and restaurants. According to the Court in *Katzenbach*, the Civil Rights Act regulated a restaurant “if...it serves or offers to serve interstate travelers or a substantial portion of the food which it serves...has moved in commerce.”³⁶ The legislation barred racial discrimination *by those who freely chose to operate a commercial enterprise*. No one was mandated to open a motel or restaurant; and no one was mandated to open the doors of their homes to bed and feed strangers. Individuals, unlike motels or restaurants, are not commercial enterprises actively engaged in interstate commerce.

30. *Morrison*, 529 U.S. at 615.

31. 379 U.S. 241 (1964).

32. 379 U.S. 294 (1964).

33. Chemerinsky, *supra* note 10.

34. *Heart of Atlanta Motel*, at 258–59 (emphasis added).

35. *Perez v. United States*, 402 U.S. at 153.

36. *Katzenbach*, at 298 (emphasis added).

The health bill's individual mandate provision would have the unprecedented effect of subjecting an individual's decisions to federal control by virtue of the fact that the individual merely resides within the borders of the United States.

Individuals' decisions *not* to enter certain economic transactions have never before subjected them to the federal regulation of a market that they have chosen *not* to enter. The health bill's individual mandate provision would have the unprecedented effect of subjecting an individual's decisions to federal control by virtue of the fact that the individual merely resides within the borders of the United States. No such result was supported or even contemplated by the Supreme Court in *Katzenbach* or *Heart of Atlanta Motel*.

Personal Health Insurance v. Drivers' Auto Liability Insurance

Some have argued that a federal mandate requiring all citizens to obtain health insurance is no different than state laws that require licensed drivers to carry proof of auto insurance when driving on the public roads.³⁷ But there are several important constitutional differences that render the comparison decidedly inapposite.

First, there is a fundamental constitutional difference between the inherent police powers of the states and the enumerated powers of the national government. A bedrock principal of the American republic is that, whereas states enjoy plenary police powers (albeit subject to various constitutional limits), the national government is limited to the enumerated powers "herein granted" to it by the Constitution. Thus, states may craft numerous regulations for the protection of their citizens which are beyond Congress's power. In striking down the federal Gun-Free School Zones Act, the *Lopez* Court acknowledged that the states already enforced similar criminal laws even though Congress could not. Likewise, when it struck down the

federal tort action for rape in *Morrison*, the Court did not question state laws allowing similar causes of action. State laws regulating the level of insurance that licensed state drivers must have to operate on state roads stem from a completely different source of constitutional authority—a state's police power—than Congress can invoke. Congress has never been thought to have such power, and the Supreme Court has always denied that such plenary federal power exists.

Second, automobile insurance requirements impose a condition on the voluntary activity of driving; a health insurance mandate imposes a condition on life itself. States do not require non-drivers, including passengers in cars with potentially bad drivers, to buy auto insurance liability policies—even though such a requirement undoubtedly would lower the auto insurance premiums for those who do drive. The auto insurance requirement is linked to *driving* and to the possibility that *bad driving* may cause injuries to others, including passengers in the driver's car, not to those who benefit from roads generally.

Third, state auto insurance requirements are limited to those who drive *on public roads*. The public roads are mostly constructed, owned, and maintained by the government, or in some other cases, are built on public rights of way or through the use of eminent domain. What a state (or private citizen) may require of someone using its property is wholly different than what it may do to control their purely private behavior. Driving on government roads is a privilege—one easily distinguished from merely living. For those who choose to drive on public roads, the state can establish terms and conditions reasonably related to preventing injury to others. States may issue drivers licenses, establish and enforce traffic laws, and may require that all those driving on their roads be adequately insured to compensate others for their injuries. These same rules do not extend to driving on private roads or property. Indeed, one may drive vehicles on private property without ever obtaining a state driver's license.

37. Chemerinsky, *supra* note 10.

Finally, states require drivers to maintain auto insurance only to cover injuries to others.³⁸ The mandate does not require drivers to insure *themselves or their property* against injury or damage. Thus, the auto insurance requirement covers the dangers and liabilities posed by drivers to *third parties* only, even though many of those same risks apply to the driver himself. The auto insurance mandate seeks to avoid the all-too-common problem of an uninsured and insolvent motorist severely injuring a third party on a public road, leaving the injured party to cover her own medical expenses. But the driver remains free to assume the risk that she will injure herself, even if she is insolvent to pay for her own expenses. Thus, states only seek to ensure that drivers can pay the equivalent of tort judgments for their wrongful conduct to *others* on state roads; they do not tell drivers how to take care of themselves.

Whether or not Congress has the power to establish a national “single payer” health care program by using its powers to tax and spend, such a program would not be supported by the Constitution’s Commerce Clause.

Therefore, comparisons between a federal mandate for personal health insurance and the state auto insurance requirements are specious. The dissimilarities between the two types of schemes actually illuminate how Congress’s new “personal responsibility” mandate is without precedent in policy and, for this reason, lacks any precedent in constitutional law. Whether or not Congress has the power to establish a national “single payer” health care program by using its powers to tax and spend, such a program would not be supported by the Constitution’s Commerce Clause. Any power to establish a national health care program simply

does not entail the distinct constitutional power to compel persons to purchase a contract of insurance from a private insurance company.

An Unconstitutional Tax

Article I, section 8 of the U.S. Constitution delegates to Congress the power “To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States....” From this enumerated taxation power, the courts have derived an implied power to spend tax revenues. Whether correct or not, current precedents do not limit this so-called “spending power” to expenditures that are necessary and proper to carry into execution an enumerated power. Therefore, the courts may well allow Congress to use its taxing and spending powers to craft a general income tax sufficient to pay for health care insurance for more Americans.³⁹ They may also allow grants to states to encourage them to insure more Americans. Finally, they may allow Congress to create tax credits for individuals who pay for their own health insurance policies. But just because Congress may use its powers of taxation in these ways does not mean that anything it decides to call a “tax” is constitutional.

Should it adopt any of these constitutional taxing and spending measures, Congress would have to incur the political costs arising from increasing the income tax and the long-term budget implications of issuing tax credits. Precisely to avoid incurring these political costs, Congress is calling fines in the Internal Revenue Code “shared responsibility penalties” so that persons fund the cost of its new regulatory scheme by channeling money through private insurance companies in the form of “premiums.” It is likely that the Supreme Court will find this effort to avoid political and fiscal accountability a pretextual assertion of Congress’s taxation powers and therefore, unconstitutional.

38. See, e.g., Carinsurancerates.com, State by State Insurability Requirements, <http://www.carinsurancerates.com/news/136-state-by-state-minimum-car-insurance-requirements.html> (last visited December 7, 2009). The amount of liability insurance varies from a high in Alaska and Maine of \$50/100/25 thousand of coverage (for bodily injury per person, bodily injury per accident, and property damage, respectively) to a low of \$10/20/5 in Mississippi.

39. But see John Eastman, *Restoring the “General” to the General Welfare Clause*, CHAPMAN L. REV. (2001), arguing that the Tax and Spending powers are limited to the ends necessary to effectuate other enumerated powers.

The Supreme Court has invalidated congressional action on the ground that such action employed unconstitutional means to an end that Congress could have constitutionally accomplished in another manner. For example, in the 1997 case of *Printz v United States*,⁴⁰ the Court struck down a provision of the Brady Handgun Violence Prevention Act requiring that local county sheriffs conduct instant background checks on gun purchasers. Although Congress had the power to provide and pay for its own enforcement mechanism, the Court thought that “[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.”⁴¹ In *Printz*, the Court rejected what it referred to as “the last, best hope of those who defend *ultra vires* congressional action, the Necessary and Proper Clause.” It concluded that, “[w]hen a ‘La[w]...for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty, it is not a ‘La[w]...proper for carrying into Execution the Commerce Clause,’ and is thus, in the words of *The Federalist*, ‘merely [an] ac[t] of usurpation’ which ‘deserve[s] to be treated as such.’ *The Federalist* No. 33, at 204 (A. Hamilton).”⁴²

Even if these bills propose a genuine tax, rather than a fine under the pretext of a “tax,” such a tax raises an independent constitutional problem. The bills alternatively call the individual mandate tax a “penalty” or a “shared responsibility payment” on any person in the United States who fails to maintain “minimum essential coverage” for one month or more, and who does not fall into one of a list of exceptions.⁴³ Rather than operating as a tax on

income, this is a tax on the person—all persons who cannot avail themselves of an exception—and is, therefore, a capitation tax.⁴⁴

Unlike income taxes, which under the Sixteenth Amendment can be assessed disproportionately among the states based upon disparities in income, the Constitution requires that capitation taxes be apportioned among the states on the basis of census population.⁴⁵ Soon after the passage of the Sixteenth Amendment, the Supreme Court acknowledged the continued constitutional requirement of apportionment of taxes imposed directly on the person:

[T]his amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes.... This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.⁴⁶

Accordingly, in order to be constitutional, the health care mandate tax must be assessed evenly based upon population, and not vary based upon factors such as the financial condition of the state’s residents. A state with 5 percent of the population must therefore pay 5 percent of the tax, even if its residents are disproportionately wealthy or poor as compared with other states.

This requirement will be impossible to meet based upon the variety of exceptions provided for in the mandate. For example, the mandate exempts individuals who are not lawfully present in the

40. *Printz v. United States*, 521 U.S. 898 (1997).

41. *Id.* at 922 (emphasis added).

42. *Id.* at 924.

43. The tax applies to “applicable individual[s]” who fail to carry “minimum essential coverage” for one month or more. See Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. § 5000A(b)(1) (2009). “Applicable individuals” are defined as all individuals within the United States who do not qualify for one of the exemptions. See H.R. 3590 § 5000A(d).

44. See BLACK’S LAW DICTIONARY 211 (6th ed. 1990) (“A tax or imposition upon the person.”).

45. U.S. CONST. art. I, §§ 2 & 9.

46. *Eisner v. Macomber*, 252 U.S. 189, 206 (1920).

United States.⁴⁷ But illegal aliens have been counted in the census,⁴⁸ and the Constitution requires that any capitation or direct tax be apportioned on a basis that would include that population. Failure to apportion the tax to include illegal immigrants would therefore be constitutionally fatal to the tax.

In order to be constitutional, the health care mandate tax must be assessed evenly based upon population, and not vary based upon factors such as the financial condition of the state's residents. This requirement will be impossible to meet based upon the variety of exceptions provided for in the mandate.

The mandate also excludes taxpayers with income under 100 percent of the poverty line,⁴⁹ individuals for whom the required contribution would exceed 8 percent of their income,⁵⁰ religious objectors,⁵¹ incarcerated individuals,⁵² and anyone determined to have suffered a hardship regarding their capability to obtain coverage, as determined in the discretion of the Secretary of Health and Human Services.⁵³ While it is common to carve out exceptions like these in the context of the individual income tax, the Constitution forbids these distinctions in capitation or direct taxes insofar as they would upset apportionment on the basis of census population, which they unquestionably will.

A Properly Restrained Supreme Court

Mandating that all private citizens enter into a contract with a private company to purchase a good or service, or be punished by a fine labeled a

“tax,” is unprecedented in American history. For this reason, there are no Supreme Court decisions authorizing this exercise of federal power. There are strong grounds to predict that the current Court will not devise any new doctrines by which to uphold an individual health insurance mandate. First and foremost, as already mentioned, to uphold this exercise of power, the Supreme Court would have to affirm for the first time in its history that Congress has a general or plenary police power—a position the Court has repeatedly refused to take.

While the *Raich* decision affirmed the continuing vitality of the *Wickard* line of Commerce Clause cases, it neither overruled nor limited *Lopez* and *Morrison*. Instead it adhered to those decisions by finding that the cultivation of marijuana was an economic activity. Unlike *Raich*, both *Lopez* and *Morrison* were facial challenges to an act of Congress. In evaluating an as-applied Commerce Clause challenge, the *Raich* Court adopted the “class of activities” defined by Congress in the Controlled Substances Act, and refused to consider the narrower class of activity proposed by the parties challenging the application of the Controlled Substances Act to them, because reaching this subset of economic activities was essential to the broader regulatory scheme. Although this made “as-applied” Commerce Clause challenges more difficult, it did nothing to undermine a “facial” challenge to a statutorily defined class of activities that are largely or entirely outside the scope of the Commerce Clause. Any more expansive reading of *Raich* is unfaithful to the actual reasoning of the Court and is an exercise in wishful thinking by those who support unlimited federal power.

47. H.R. 3590 § 5000A(d)(3).

48. Memorandum from Margaret Mikyung Lee, CRS legislative attorney, & Erika K. Lunder, CRS legislative attorney, to the Honorable David Vitter, regarding legal analysis of requiring census respondents to indicate citizenship status (July 28, 2009) (on file with the authors).

49. H.R. 3590 § 5000A(e)(2).

50. *Id.* § 5000A(d)(1).

51. *Id.* § 5000A(d)(2).

52. *Id.* § 5000A(d)(4).

53. *Id.* § 5000A(e)(5).

Moreover, there is every reason to believe that five Justices of the Supreme Court will be open, and perhaps even eager, to reaffirm the principles of *Lopez* and *Morrison* in a case involving neither an as-applied challenge nor marijuana, and to dispel any impression that these cases were permanently eclipsed by *Raich*. There is no reason to believe, and much reason to doubt, that a majority of the current Justices will be interested in expanding federal power even farther than they did in *Raich*. And it is quite unlikely that a majority of Justices is open to any constitutional theory that would officially and effectively abolish the enumerated powers scheme embodied in Article I and the Tenth Amendment, as would be necessary to uphold a personal health insurance mandate.

Any more expansive reading of Raich is unfaithful to the actual reasoning of the Court and is an exercise in wishful thinking by those who support unlimited federal power.

Furthermore, the 2008 case of *District of Columbia v. Heller* shows that a majority of the current Court takes the text and original public meaning of the Constitution quite seriously, especially when considering issues not controlled by existing precedent. A constitutional challenge to an individual health care mandate would be considered an opportunity by the Justices who made up the *Heller* majority to further vindicate their commitment to text and history in evaluating claims of federal power.

This majority of Justices would know that a refusal to extend the Commerce Clause to reach the individual health insurance mandate will not

invalidate any other law. These Justices will also know that Congress has other constitutional, and more politically accountable, means of accomplishing the same ends. Further, the majority will be aware that the health care mandate is not necessary to win a war or respond to a serious economic depression, areas where the Court has sometimes deferred to the political branches. To the contrary, the majority will likely understand that the individual mandate may even cut against health care cost containment.

Although it is always difficult for the Supreme Court to thwart what is perceived to be the popular will, polling consistently shows that this legislation, if enacted, will fly in the face of popular opposition. If that remains true after enactment, the majority of the Justices who are inclined to preserve the enumerated powers scheme and adhere to the original meaning of the text will have little inclination or incentive to stretch the Constitution to reach so decidedly unpopular and far-reaching a power as this one.

Conclusion

In theory, the proposed mandate for individuals to purchase health insurance could be severed from the rest of the 2,000-plus-page “reform” bill. The legislation’s key sponsors, however, have made it clear that the mandate is an integral, indeed “essential,” part of the bill.⁵⁴ After all, the revenues paid by conscripted citizens to the insurance companies are needed to compensate for the increased costs imposed upon these companies and the health care industry by the myriad regulations of this bill.

The very reason why an unpopular health insurance mandate has been included in these bills

54. See, e.g., Donna Smith, “U.S. Health Insurance Mandate Gains Support,” REUTERS, March 27, 2009:

Senate Finance Committee Chairman Max Baucus, a Democrat who is helping write healthcare legislation, said an insurance requirement, or mandate, would help the market function better and reduce premium costs for everyone. Baucus argued that the cost of medical care for people with no insurance is being shifted to those with insurance, forcing costs higher. “An individual obligation to get health coverage is essential,” Baucus said in a speech to the Center for American Progress think tank. (emphasis supplied).

See also Ceci Connolly, *Like Car Insurance, Health Coverage May Be Mandated: A Proposed Requirement That All Americans Have Policies Has Broad Support Among Reformers*, WASH. POST, July 22, 2009 (“Without an individual mandate, you’re never going to get to universal coverage.”).

shows why, if it is held unconstitutional, the remainder of the scheme will prove politically and economically disastrous. Members need only recall how the Supreme Court's decision in *Buckley v. Valeo*—which invalidated caps on campaign spending as unconstitutional, while leaving the rest of the scheme intact—has created 30 plus years of incoherent and pernicious regulations of campaign financing and the need for repeated “reforms.” Only this time, the public is aligned against a scheme that will require repeated unpopular votes, especially to raise taxes to compensate for the absence of the health insurance mandate.

These political considerations are beyond the scope of this paper, and the expertise of its authors. But Senators and Representatives need to know that, despite what they have been told, the health insurance mandate is highly vulnerable to challenge because it is, in truth, unconstitutional. And political considerations aside, each legislator owes a duty to uphold the Constitution.

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