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Purchase Health Insurance or Else: Why Individual Health Insurance Mandates Enacted by the Federal Government Are Unconstitutional

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I. Introduction

President Obama and the Democrats are on the verge of making history. Since Theodore Roosevelt first proposed the idea of health care reform, nearly every President has tried, and failed, to enact such reform. The Democrats' plan, however, includes a controversial policy that, if enacted, would constitute a violation of Congress's authority under the United States Constitution.

There is no denying that President Obama and the Democrats have good intentions in implementing an individual mandate to purchase health insurance. A legitimate argument exists that if all Americans have health insurance, fewer people will freeload the system, leading to a decrease in premiums.[1] At a time when the economy is dwindling and health care costs are on the rise, Americans are surely open to any ideas that will lower costs. But does the federal government have the authority to mandate that all individuals purchase health insurance?

In answering this question, one must first look to the text of the Constitution itself for guidance. James Madison wrote in *Federalist #45* that "[t]he powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."[2] Congress's defined enumerated powers are listed in Article I, Section 8 of the Constitution. Some of the well-known enumerated powers of Congress include the power to declare war, raise and support armies, coin money, and lay and collect taxes.[3] The power to provide health care to the American people is not listed among those specifically defined enumerated powers of Congress, let alone the power to require individuals to purchase health insurance. Because such a power is not clearly enumerated in the Constitution, Congress will have to rely on some implied power within Article I, Section 8 if it chooses to adopt an individual health insurance mandate. The two constitutional powers that Congress would likely rely on in passing an individual mandate are the Commerce Clause and the Tax and Spend Clause.

II. Summary of Analysis

This Comment provides extensive analysis of Congress's legislative powers under the Constitution and explains why an individual health insurance mandate enacted by the federal government is

beyond the scope of those powers. This Comment first analyzes the Commerce Clause, found in Article I, Section 8, Clause 3 of the Constitution. Interpreted first in 1824 by the Supreme Court, the Commerce Clause's scope has changed significantly through the years. However, Congress lacks the power to mandate that all individuals purchase health insurance primarily because it is attempting to regulate inactivity. Never in the history of the Commerce Clause has the Court approved legislation that regulates inactivity. The Comment next analyzes the Tax and Spend Clause, found in Article I, Section 8, Clause 1 of the Constitution. The House and Senate have proposed legislation that characterizes the penalties enforced for failing to maintain adequate health insurance as an income tax and an excise tax, respectively. Although Congress has broad power to tax and spend for the general welfare, important limitations exist. Further, the Constitution itself imposes specific limitations on Congress's power to tax depending on the actual classification of the tax. The Comment then compares the requirement that all drivers have car insurance to Congress's mandate that all individuals maintain adequate health insurance. President Obama and others have pointed to the car insurance analogy as support for Congress's authority to enact an individual health insurance mandate; the contrasts between the mandates, however, are stark. The Comment concludes by offering a constitutional solution to Congress's goal of seeing that individual health insurance mandates are imposed. This goal, though, can only be accomplished with the help of the states. Through the Spending Clause, Congress could condition the receipt of relevant federal funds to states that enact individual health insurance mandates. However, as public sentiment toward the individual mandate rises and state legislatures across the country move to ban individual health insurance mandates, it is clear that Congress's goal of achieving universal health care through an individual mandate will most certainly fail.

III. Commerce Clause

Article I, Section 8, Clause 3 of the Constitution states: "The Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."[4] The purpose of the clause was chiefly to prevent states from discriminating against each other by "interfering with the freedom of commercial intercourse . . . ."[5] For example, under the Articles of Confederation, Congress was powerless to prevent states from enacting "debtor relief" laws that allowed in-state debtors to cancel debts owed to out-of-state creditors.[6] This example illuminates the shortcomings of the Articles of Confederation that the Constitution sought to fix through the Commerce Clause.[7]

The Court's interpretation of the Commerce Clause has changed dramatically through the years. Constitutional scholar Erwin Chemerinsky appropriately separates the Court's Commerce Clause jurisprudence into four eras: "The Initial Era: *Gibbons v. Ogden* Defines the Commerce Power;" "The 1890s-1937: A Limited Federal Commerce Power;" "1937-1990s: Broad Federal Commerce Power;" and "1990s-???: Narrowing of the Commerce Power and Revival of the Tenth Amendment as a Constraint on Congress."[8]

The "Initial Era" was made famous by the 1824 case of *Gibbons v. Ogden*,***[9]*** when the Court defined the scope of Congress's Commerce Clause.[10] In this case, Robert Livingston and Robert Fulton were granted a monopoly by the New York legislature to operate their steamboats in New York waters.[11] Thomas Gibbons was also operating a ferry service in the New York waters, leading to conflict between the competing services.[12] Gibbons argued that he was within his rights to navigate the waters because his ferry was licensed under federal law.[13] The Court held that navigation is considered "commerce" with respect to Congress's ability to regulate pursuant to the Commerce Clause.[14] Chief Justice Marshall, author of the majority opinion, further defined commerce as "intercourse," something more than the mere traffic of goods between states and

foreign nations.[15] Marshall also defined “among the states,” stating that Congress may only regulate interstate commerce between two or more states; the “completely internal commerce of a State, then, may be considered as reserved for the State itself.”[16]

During the second era of Commerce Clause jurisprudence (1890s-1937), the Court was dominated by a majority of states-rights Justices led by Chief Justice Fuller.[17] The shift in political philosophy favoring a strong national government to one of “laissez-faire, unregulated economy”[18] resulted in a number of cases that limited Congress’s power under the Commerce Clause. One such case decided in 1895 was *United States v. E.C. Knight Co*.[19] In *E.C. Knight*, Congress passed the Sherman Antitrust Act, legislation aimed at controlling monopolies engaged in trade between states.[20] The Court ruled that the manufacturing of refined sugar by the American Sugar Refining Company was a local activity not subject to congressional regulation through the Commerce Clause.[21]

The third era (1937-1990) of Commerce Clause jurisprudence represented a return to a broader interpretation of the congressional power.[22] In response to the Great Depression, Congress passed a series of laws proposed by President Franklin Roosevelt in an effort to revamp the economy.[23] In *NLRB v. Jones & Laughlin Steel Corp.*,[24] the Court upheld the National Labor Relations Act of 1935 that regulated unfair labor practices of companies engaged in interstate commerce.[25] Chief Justice Hughes, author of the majority opinion, introduced the “substantially affects” test: “Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.”[26] Justice McReynolds, author of the dissent, noted great concern over the expanded view of the Commerce Clause, reasoning that the majority’s view of the Commerce Clause power would “extend it into almost every field of human industry.”[27] Justice McReynolds’ concern was amplified when the Court expanded Congress’s authority under the Commerce Clause even further in the case of *Wickard v. Filburn*.[28]

In *Wickard*, Congress passed the Agricultural Adjustment Act of 1938, allowing the federal government to regulate the amount of wheat a farmer could grow in order to control the supply of grain in the aftermath of the Great Depression.[29] Roscoe Filburn exceeded this amount and was fined; Filburn, though, argued that the extra wheat was used strictly for private consumption on his farm; thus, Congress had no authority under the Commerce Clause to regulate such activity.[30] The Court, however, ruled against Filburn, reasoning that Congress had the power to regulate purely intrastate activity if “[the activity] exerts a substantial economic effect on interstate commerce.”[31] Applying this principle, the Court found that a farmer’s act of growing more wheat than was legally permitted would have a substantial economic effect on interstate commerce.[32]

In light of *Wickard*, Congress’s power under the Commerce Clause seemed all but unlimited. This was the case until the Court’s decision in *United States v. Lopez*.[33] For the first time in sixty years, the Court ruled legislation passed by Congress unconstitutional under the Commerce Clause.[34] In *Lopez*, the Court held Section 922(q) of the Gun-Free School Zones Act of 1990 (restricting the possession of a firearm in a school zone) unconstitutional.[35] The Court ruled the section of the statute was beyond the scope of the Commerce Clause because the mere possession of a firearm does not have the requisite causal nexus to interstate commerce, nor does possessing a firearm represent an economic activity.[36] The Court utilized similar reasoning in *United States v. Morrison*,[37] invalidating a section of the Violence Against Women Act of 1994 that allowed victims of gender motivated violence to sue their attackers in federal court.[38]

It is safe to conclude from the above analysis that Commerce Clause jurisprudence has changed dramatically through the years. Although the Court in *Lopez* and *Morrison* held Congress's Commerce Clause power is not without limits, the expansive view of *Wickard* was resurrected in *Gonzales v. Raich*.[39] In *Raich*, the Court upheld the Controlled Substances Act,[40] making possession of marijuana for any reason illegal.[41] This case arose after members of the Drug Enforcement Agency destroyed the homegrown marijuana plants of two California citizens who were using the drug strictly for medical purposes, action legal under California law.[42] Holding that the Controlled Substances Act was constitutional under the Commerce Clause, the Court noted the case's similarity to Congress's regulation of wheat in *Wickard*: "In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial affect on supply and demand in the national market for that commodity."[43] Further, the Court reasoned that it need not determine whether the respondents' production of marijuana for home consumption in the aggregate has a substantial affect on interstate commerce in fact, "but only whether a 'rational basis' exists for so concluding."[44]

IV. Application of Commerce Clause to Mandated Health Insurance

As the analysis above illustrates, Congress's power under the Commerce Clause has changed dramatically since *Gibbons*. The *Raich* decision reaffirmed the Court's broad interpretation of the Commerce Clause, whereby Congress must merely have a rational basis for concluding that purely local activity will substantially affect interstate commerce.[45] However, even under this broad interpretation, Congress lacks the constitutional authority under the Commerce Clause to enact an individual health insurance mandate.

The primary argument against Congress's ability to mandate that individuals buy health insurance under the Commerce Clause is that Congress is attempting to regulate inactivity rather than actual activity. In every Commerce Clause case in which the Court validated Congress's legislation, the regulated party engaged in some activity to trigger the regulation. For example, in *Gibbons* a ferry traveled between two states;[46] in *Jones & Laughlin Steel* a company manufactured goods;[47] in *Wickard* a farmer grew wheat;[48] and in *Raich* the defendants grew marijuana.[49] Conversely, Congress is attempting to regulate inactivity by relying on the Commerce Clause to pass a bill mandating that individuals buy health insurance. In order to trigger this regulation, an individual must (1) be an adult U.S. citizen; (2) not have health insurance; and (3) not fall within several exemptions to the mandate, e.g., maintaining a gross income below 100% of the poverty line.[50] Put simply, to trigger this regulation, one must be living and without health insurance. Highlighting Congress's unprecedented proposal to regulate inactivity, Randy Barnett, Nathaniel Stewart, and Todd F. Gaziano, all of The Heritage Foundation,[51] wrote:

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.[52]

At a minimum, the Court has required that Congress regulate some activity; otherwise, Congress is powerless to regulate under the Commerce Clause. For example, the company in *Jones & Laughlin Steel* would not have been subjected to the regulation of Congress if it chose not to manufacture goods that would ship interstate. Further, the respondents in *Raich* would not have been subjected to

the regulation of Congress if they chose not to grow marijuana. By the same logic, individuals who choose not to purchase health insurance should not be subject to the regulation of Congress simply because he or she chooses not to purchase health insurance.

In response to this argument, proponents of an individual health insurance mandate contend that the failure to purchase health insurance, in the aggregate, substantially effects interstate commerce; thus, Congress has the authority to regulate such conduct under the Commerce Clause.[53] For example, individuals without health insurance who cannot pay their medical bills after sustaining a major injury cause premiums of the insured to rise nationwide.[54] This argument in support of Congress's authority to impose an individual health insurance mandate under the Commerce Clause, however, ignores the principles of *Lopez* and *Morrison*. In *Lopez*, the Court noted that prior cases, like *Wickard*, provide great deference to congressional action.[55] The Court, though, placed a substantial limitation on the federal government's power to enact legislation under the Commerce Clause, allowing Congress the power to regulate only economic activities.[56] The Court held: "[A]lthough this Court has upheld a wide variety of congressional Acts regulating intrastate economic activity that substantially affected interstate commerce, the possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, have such a substantial effect on interstate commerce."[57] Under the same rationale, the Court in *Morrison* ruled parts of the Violence Against Women Act unconstitutional because Congress was attempting, under the Commerce Clause, to regulate non-economic activity.[58] The *Morrison* Court reiterated the consequences of an unlimited Commerce Clause power espoused by the majority opinion in *Lopez*: "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur."[59]

With this limitation in mind, an individual who fails to purchase adequate health insurance is clearly not an economic activity. In fact, it is not an activity at all. Rather, Congress is attempting to force individuals into private contracts for services merely for existing and not having adequate health insurance. Just because an economic activity has a substantial effect on interstate commerce does not mean that the federal government has the power under the Commerce Clause to force an individual to engage in that activity. If this were the case, the federal government would have unlimited power to force any individual to purchase a good or service if it has a rational basis to believe that such purchase will have a substantial effect on interstate commerce. Professor Mark A. Hall's promotes this fallacious argument in an article supporting Congress's authority to impose an individual health insurance mandate through the Commerce Clause.[60]

Professor Hall first notes that the Court has held that the federal government may regulate the insurance industry.[61] In applying the Commerce Clause principles to the individual mandate, Professor Hall argues that an individual health insurance mandate directly effects interstate commerce in several ways, including how covering more people with health insurance will lower costs for everyone.[62] Professor Hall's Commerce Clause analysis, however, is not consistent with the Court's interpretation of Commerce Clause cases. In interpreting whether Congress has the power to regulate under the Commerce Clause, the Court must determine what activity Congress is attempting to regulate.[63] Conversely, Professor Hall's argument implies that the Court must determine whether an individual mandate will have a substantial effect on interstate commerce, rather than whether the purported activity to be regulated will have a substantial effect on interstate commerce. Of course it may be true that an individual mandate to purchase health insurance will substantially effect interstate commerce, but it is not the proper analysis in determining whether Congress's regulation is within the scope of the Commerce Clause. Even under the most expansive interpretations of the Commerce Clause, the legislation in *Wickard* and *Raich* regulated some activity

- the growing of wheat[64] and marijuana,[65] respectively. The Court in *Wickard*, for example, did not determine whether the regulation of wheat (the legislation) will substantially effect interstate commerce, but instead decided whether the unlimited growth of an individual's wheat (the activity), in the aggregate, substantially effects interstate commerce.[66] There is no disputing the federal government's power to regulate the insurance industry generally.[67] This authority, however, does not allow the federal government to mandate that all individuals purchase health insurance. In fact, the Congressional Research Service, a non-partisan organization, made note of the unprecedented nature of the proposed mandate, writing, "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 service."[68] Based on current law, Congress lacks the authority under the Commerce Clause to enact such unprecedented legislation.

V. Tax and Spend Clause

Without the power under the Commerce Clause to enact an individual health insurance mandate, Congress may turn to Article I, Section 8, Clause 1 of the Constitution, the Tax and Spend power. This clause states: "The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[69] A taxation power was not granted to the federal government under the Articles of Confederation. Instead, the Articles of Confederation granted power only to the state governments to raise revenues through taxation.[70] The federal government would then request funds from the states when needed.[71] However, the states did not always comply with this request.[72] The federal government's need for a taxation power was apparent. Alexander Hamilton, the nation's first Secretary of Treasury,[73] was the leading voice for granting a taxation power to the federal government. Hamilton wrote in Federalist #21, "There is no method of steering clear of this inconvenience, but by authorizing the national government to raise its own revenues in its own way."[74] Additionally, Hamilton wrote in Federalist #30, "[T]here must be interwoven, in the frame of the [federal] government, a general power of taxation, in one shape or another."[75]

Subsequently, the Constitution was ratified granting a Tax and Spend power to Congress through Article I, Section 8, Clause 1. Upon ratification, a debate ensued between Hamilton and Madison over the meaning of the General Welfare Clause.[76] Under Hamilton's interpretation, the General Welfare Clause grants an independent legislative power to tax and subsequently pass legislation in furtherance of the general welfare of the United States.[77] Madison rejected this interpretation, denying that the General Welfare Clause grants a separate legislative power, arguing instead that the Clause is applicable only to the enumerated powers found in Article I, Section 8 of the Constitution.[78] The Court took on these two interpretations in *United States v. Butler*.[79] Although the Court ruled the taxes associated with the Agricultural Adjustment Act unconstitutional because they "invaded the reserved rights of the states,"[80] the Court adopted Hamilton's interpretation of the General Welfare Clause, writing that Congress's power to "authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[81] In adopting Hamilton's approach, *Butler* stands for the principle that Congress has broad power to tax and spend for the general welfare, so long as Congress does not violate any other constitutional provision.[82]

Another tax enacted by Congress that violated a constitutional provision separate from the Tax and Spend Clause was at issue in *Baily v. Drexel Furniture Co*.[83] In *Baily*, an action was brought challenging the constitutionality of the Child Labor Tax Law, a statute that assessed a tax penalty on companies that employed children under the age of fourteen.[84] The Court ruled the statute

unconstitutional because it violated the Commerce Clause.[85] Writing for the majority, Chief Justice Taft concluded the "so-called tax" was a penalty whereby Congress employed a "prohibitory and regulatory effect" in an area beyond the bounds of Congress's authority under the Commerce Clause.[86] Although the *Baily* decision would likely be decided differently today because of the Court's expansion of Congress's power under the Commerce Clause, the underlying rule of the decision lives on; Congress may not use the Tax and Spend Clause to regulate activity beyond the boundaries of the Commerce Clause.[87]

Another limitation to the Tax and Spend Clause is found in a separate clause of the Constitution. Article I, Section 9, Clause 4 of the Constitution states: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."[88] In *Pollock v. Farmers' Loan & Trust Co.*,[89] the Court ruled that income taxes imposed by the federal government were unconstitutional because they were direct taxes that needed to be apportioned pursuant to Article I, Section 9, Clause 4 of the Constitution.[90] The Sixteenth Amendment was enacted in response to *Pollock*, which states: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[91] Thus, under the Sixteenth Amendment, Congress has the power to impose taxes on income without apportionment among the states. The Sixteenth Amendment, however, did not change the constitutional requirement that all other capitation and direct taxes be apportioned among the states.[92]

VI. Application of Tax and Spend Clause to Mandated Health Insurance

In an interview with President Obama, ABC News Chief Washington Correspondent George Stephanopoulos questioned whether an individual mandate to buy health insurance is a tax increase: "Under this mandate, the government is forcing people to spend money, fining you if you don't [buy insurance] . . . How is that not a tax?"[93] The President flatly denied the claim that a mandate requiring citizens to purchase health insurance or pay a fine is a tax, saying, "[F]or us to say you've got to take a responsibility to get health insurance is absolutely not a tax increase."[94] President Obama noted the analogy of mandated health insurance to the states' requirement that all drivers possess car insurance, saying, "Nobody considers [car insurance] a tax increase."[95] The Internal Revenue Service ("IRS"), however, does not check to make sure all individuals have car insurance; in contrast, under the proposed legislation, the IRS would check to make sure that all individuals have health insurance.[96] Knowing tax increases are not popular policy, President Obama is trying to spin the idea of forcing someone to buy a product or pay a fine into something other than an ordinary tax. In fact, proposed legislation approved by the Senate calls the penalty an "excise tax."[97] Responding to President Obama, Stephanopoulos quoted the definition of "Tax" in *Merriam Webster's Dictionary*: "[A] charge, usually of money, imposed by authority on persons or property for public purposes."[98] The important question, however, is whether the Constitution allows the federal government to enact such a tax.

Senator Bernie Sanders of Vermont argued that the Tax and Spend Clause authorizes Congress to enact an individual mandate, much like the Clause was used to justify Medicare.[99] However, an individual health insurance mandate shares little in common with the Medicare program. Medicare is a social program created by the federal government in order to provide health insurance to individuals over sixty-five years of age.[100] The program is funded through payroll taxes or income taxes paid on Social Security benefits.[101] Unlike Medicare, an individual health insurance mandate is not a government-run program funded by compulsory taxes; instead, the proposed legislation forces individuals into private contracts with health insurance companies. Further, the fines levied for not maintaining health insurance do not go to any special program developed by Congress. Thus,

Senator Sanders's argument that the Tax and Spend Clause constitutionally justifies an individual mandate because Medicare was passed through the same authority is unfounded.

Professor Hall suggests that an individual mandate would be constitutional under the Tax and Spend Clause because of the Court's decision in *Helvering v. Davis***[102]** upholding the constitutionality of the Social Security tax.[103] Professor Hall suggests that an individual mandate differs "somewhat" from Social Security;[104] however, a mandate that individuals purchase health insurance from a private company differs significantly from Social Security. First, the Social Security tax bears closer relation to an ordinary tax compared to the tax associated with health insurance mandates. The Social Security tax is utilized in order to generate revenue for a specific congressional purpose, much like Medicare, while the tax associated with failing to maintain health insurance bears closer relationship to a penalty, as discussed in *Bailey*.[105] Second, all employers and employees are subject to the Social Security tax,[106] while only those individuals that do not maintain health insurance are required to make compulsory payments to the IRS. Congress would be well within its constitutional authority to create a separate social program, like Social Security or Medicare, or it could merely raise taxes in order to generate the funds necessary to provide health care for all citizens. Raising taxes, however, is not popular with the American people.

Professor Hall further argues that a "pay or play" system is constitutional because the Court has long overturned precedents, like *Baily*, that invalidated taxes with purely regulatory effects.[107] As mentioned above, however, *Bailey* has not been overturned. David B. Rivkin Jr. and Lee A. Casey noted *Bailey* and its potential impact on federally mandated health insurance in the *Washington Post*, writing, "[the Court] has not repudiated the fundamental principle [of *Baily*] that Congress cannot use a tax to regulate conduct that is otherwise indisputably beyond its regulatory power."[108] Thus, because Congress lacks the power under the Commerce Clause to implement a pay or play system, *Bailey* would be utilized to rule the mandate unconstitutional.

Finally, the federal government lacks the power under the Tax and Spend Clause to pass the proposed health insurance mandate because the penalties are direct taxes not apportioned among the states, action restricted by Article I, Section 9, Clause 4 of the Constitution.[109] Under the proposed bill in the Senate, the penalties imposed for not maintaining adequate health insurance are defined as "excise taxes."[110] This is significant because excise taxes are not direct taxes that need be apportioned among the states. *Black's Law Dictionary* defines excise taxes as, "A tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)."[111] Arguing the validity of the penalty as an excise tax, Professor Jack M. Balkin wrote that the penalty is "not a capitation tax because it is not a general tax on individuals unrelated to their activities; it is a penalty imposed on persons who fail to make specific expenditures in a given month."[112] Thus, Professor Balkin argues that the failure of an individual to enter into a private contract to purchase health insurance is an "activity" that can be subject to an excise tax. Scholars attack this argument as "intellectually incoherent."[113] An excise tax is a tax on a "thing;" people who fail to purchase health insurance are not things.[114] Peter Urbanowicz and Dennis G. Smith of The Federalist Society for Law and Public Policy Studies[115] wrote: "Imposing an excise tax on conduct -- or the absence of certain conduct, such as failing to obtain health insurance -- would be a novel use of the excise tax authority."[116]

Nor can Congress classify the penalties as income taxes exempt from apportionment.[117] Under the proposed bill in the House, an individual who fails to maintain adequate health insurance will be subject to a tax equal to 2.5% of his or her adjusted gross income.[118] Although characterized as an income tax, the proposed legislation also includes a limitation to the penalty, whereby the tax imposed for not maintaining adequate health insurance "shall not exceed the applicable national

average premium for such taxable year."[119] For many taxpayers, the cost of a qualifying health insurance plan will control the extent of the penalty for failing to maintain adequate health insurance, rather than their adjusted gross incomes.[120] Thus, the proposed tax is not a tax on an individual's income; instead, it is a tax on the individual, a capitation tax.[121] As detailed above, Congress has no authority to levy capitation taxes unless they are apportioned among the states.[122] This requirement will be impossible to meet under the proposed legislation because of the numerous exceptions to the individual mandate, including taxpayers with income under 100% of the poverty line, religious objectors, and illegal aliens, all of which are included in the census for calculating population.[123] Thus, both the House and Senate have proposed legislation that would impose an unconstitutional capitation tax on the American people. Based on current law, Congress lacks the authority under the Tax and Spend Clause to enact such unprecedented legislation.

VII. Mandated Health Insurance Compared to Car Insurance

Some, including President Obama, analogize the federal government's requirement that all individuals have adequate health insurance to the requirement that all individuals who wish to drive must have car insurance.[124] However, major distinctions exist between the two mandates; the latter passing constitutional muster while the former fails. The first distinction is that state governments, not the federal government, impose car insurance mandates.[125] This distinction is important because, as James Madison wrote, "[t]he powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."[126] Thus, because a state government may constitutionally impose an insurance mandate does not mean the same is true for the federal government.

Another important distinction between mandated health insurance and mandated car insurance are the requirements that trigger each mandate. Generally, two things must occur for an individual to be subjected to mandated car insurance: (1) an individual must first obtain a driver's license through the state; and (2) after obtaining a license, the individual must choose to operate a vehicle on public roads. On the other hand, the health insurance mandate requires only that you are an adult U.S. citizen without health insurance. The contrast is stark: one mandate forces individuals to buy car insurance only after making the choice to engage in the privilege of driving, while the other mandate forces individuals to buy health insurance for merely being alive. The analogy between the two mandates falls flat; it is illogical to conclude that the federal government has the constitutional authority to require all citizens to purchase health insurance simply because every U.S. citizen must purchase car insurance before driving.

VIII. Alternative Constitutional Solution for Congress

The above analysis shows that Congress lacks the constitutional power under the Commerce Clause and the Tax and Spend Clause to enact legislation that mandates all individuals buy health insurance. However, if Congress is intent on seeing an insurance mandate enacted throughout the country, a constitutional alternative exists. This constitutional alternative, though, can only be achieved with the help of the states.

As mentioned above, Massachusetts enacted an individual health insurance mandate that requires Massachusetts's citizens to maintain adequate health insurance or pay a fine.[127] Further, Massachusetts has already prevailed in a suit challenging the constitutionality of the state's health insurance mandate.[128] This judgment, of course, sheds no light on the constitutionality of an individual insurance mandate enacted by the federal government because "[t]he powers delegated

by the proposed Constitution to the Federal Government, are few and defined . . . [while] [t]hose which are to remain in the State Governments are numerous and indefinite."[129] However, in *South Dakota v. Dole*,[130] the Court held that Congress has the constitutional authority to condition federal funds to states upon a state's enactment of federal legislation, pursuant to the Spending Clause.

Dole involved a challenge to a federal law that withheld a portion of federal funds from states that allowed individuals under the age of twenty-one to purchase or possess alcoholic beverages.[131] In determining the scope of the Spending Clause, Chief Justice Rehnquist, author of the majority opinion, wrote: "[O]bjectives not thought to be within Article I's 'enumerated legislative fields[]' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."[132] The Court imposed four requirements on federal legislation that conditions funds to the states.[133] First, the condition must be in pursuit of "the general welfare," as the text of the Spending Clause requires.[134] Second, if Congress chooses to condition a state's receipt of federal funds, it "must do so unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."[135] Third, the conditions on federal grants must be related "to the federal interest in particular national projects or programs."[136] Finally, any other constitutional provision may act as an "independent bar" to the conditional grant of federal funds.[137]

To this final requirement, Chief Justice Rehnquist noted that the limitations on Congress's spending power is "less exacting" than when Congress attempts to regulate directly.[138] Chief Justice Rehnquist noted that the Tenth Amendment can act as an "independent constitutional bar" when the "financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[139] In *Dole*, however, the federal government was withholding merely five-percent of total funds to those states that chose not to enact the federal program.[140] Examining several scholars' theories relating to this limitation, Reeve T. Bull concluded:

In short, the unconstitutional conditions doctrine seemingly protects only against the violation of explicitly enumerated constitutional rights, such as those dealing with civil liberties like the right of free speech or the right to be free of cruel and unusual punishment, and thereby offers little protection against the expansion of federal authority into areas traditionally controlled by the states.[141]

Thus, even if Congress lacks the power to regulate an activity under the Commerce Clause, Congress may still condition federal funds to the states upon enactment of federal legislation that regulates such activity.

Although Congress lacks the constitutional authority to enact an individual health insurance mandate, the federal government may condition funds upon a state's enactment of such a program as long as the requirements of *Dole* are met. The federal government's goal of achieving universal health care through an individual mandate, however, is likely to fail if Congress chooses this route. Like Congress, many state governments would face similar pressures not to enact laws that force citizens to purchase health insurance. In fact, at least ten state legislatures have moved to amend their state's constitution in order to outlaw individual health insurance mandates.[142] Furthermore, the individual health insurance mandate imposed in Massachusetts in 2006 has faced significant criticism; only twenty-six percent of Massachusetts's citizens consider the health care reform a success in the three years since its enactment.[143]

IX. Conclusion

No one denies that health care reform is desperately needed in America. Individuals going bankrupt because of their inability to pay hospital bills is unacceptable in the United States. As noble as the cause is, however, the federal government must take caution not to pass legislation that violates the Constitution. As this Article has shown, enactment of an individual health insurance mandate by Congress would do just that. Through the Constitution, the Founding Fathers created a federal government of limited powers. Neither the Commerce Clause nor the Tax and Spend Clause provide any justification for the enactment of an individual health insurance mandate by Congress. Alternatively, Congress could condition receipt of federal funds to those states that enact federal legislation that includes an individual mandate. However, growing criticism of an individual mandate will likely lead to only sporadic enactment. Although the health care system in this country is in urgent need of reform, no cause is greater than the Constitution. With the Constitution standing in its way, Congress must get back to the drawing board, quickly.

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[1]. Janet Trautwein, Op-Ed., *Why We Need a Strong Individual Mandate*, Wall St. J., Nov. 11, 2009, at A19.

[2]. The Federalist No. 45 (James Madison).

[3]. U.S. Const. art. I, § 8.

[4]. U.S. Const. art. I, § 8, cl. 3.

[5]. Westel Woodbury Willoughby, The Constitutional Law of the United States 288 (Baker, Voorhis & Co. 1910).

[6]. Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 Harv. J.L. & Pub. Pol'y 849, 856 (2002).

[7]. E. Parmalee Prentice & John G. Egan, The Commerce Clause of the Federal Constitution 3 (Callaghan & Co. 1898).

[8]. Erwin Chemerinsky, Constitutional Law 112-53 (2d ed., Aspen 2005).

[9]. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[10]. Chemerinsky, *supra* note 30, at 113.

[11]. *Gibbons*, 22 U.S. (9 Wheat.) at 1.

[12]. *Id.* at 2.

[13]. *Id.*

[14]. *Id.* at 190.

[15]. *Id.* at 189-90.

[16]. *Id.* at 195.

[17]. Chemerinsky, *supra* note 30, at 116-17.

[18]. *Id.* at 116.

[19]. United States v. E.C. Knight Co., 156 U.S. 1 (1895).

[20]. *Id.* at 2.

[21]. *Id.* at 12.

[22]. Chemerinsky, *supra* note 30, at 129-30.

[23]. *Id.* at 130.

[24]. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[25]. *Id.* at 41-42.

[26]. *Id.* at 37.

[27]. *Id.* at 94 (McReynolds, J., dissenting).

[28]. Wickard v. Filburn, 317 U.S. 111 (1942).

[29]. *Id.* at 114-15.

[30]. *Id.* at 114.

[31]. *Id.* at 125.

[32]. *Id.* at 127-28.

[33]. United States v. Lopez, 514 U.S. 549 (1995).

[34]. Chemerinsky, *supra* note 30, at 153.

[35]. *Lopez*, 514 U.S.at 551.

[36]. *Id.* at 561-62.

[37]. United States v. Morrison, 529 U.S. 598 (2000).

[38]. *Id.* at 617.

[39]. Gonzales v. Raich, 545 U.S. 1 (2005).

[40]. *Id.* at 2.

[41]. *Id.* at 1.

[42]. *Id.*

[43]. *Id.* at 2.

[44]. *Id*. (citing United States v. Lopez, 514 U.S. 549, 557 (1995)).

[45]. *Raich*, 545 U.S. at 1.

[46]. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[47]. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41-42 (1937).

[48]. Wickard v. Filburn, 317 U.S. 111, 114 (1942).

[49]. *Raich*, 545 U.S. at 1.

[50]. H.R. 3590, § 1411(b)(5)(B).

[51]. The Heritage Foundation is a public policy research institute whose mission is to formulate and promote conservative public policies. *See* http://www.heritage.org/.

[52]. Randy Barnett, Nathaniel Stewart & Todd F. Gaziano, *Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional*, The Heritage Foundation, Dec. 9, 2009, *available at* http://www.heritage.org/Research/LegalIssues/lm0049.cfm.

[53]. *See* David B. Rivkin, Jr., Lee A. Casey & Jack M. Balkin, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. Pa. L. Rev. PENNumbra 93, 107-08 (2009).

[54]. *Id.* at 103.

[55]. United States v. Lopez, 514 U.S. 549, 567 (1995).

[56]. *Id*. at 549.

[57]. *Id.*

[58]. United States v. Morrison, 529 U.S. 598, 617 (2000).

[59]. *Id.* at 611 (citing *Lopez*, 514 U.S.at 577).

[60]. Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, 37 J.L. Med. & Ethics 40, 42 (2009).

[61]. *Id*.

[62]. *Id*.

[63]. *Lopez*, 514 U.S.at 559.

[64]. Wickard v. Filburn, 317 U.S. 111, 114-15 (1942).

[65]. Gonzales v. Raich, 545 U.S. 1 (2005).

[66]. *Wickard*, 317 U.S. at 128-29.

[67]. *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

[68]. Cynthia Brougher & Jennifer Staman, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, Cong. Research Serv., July 24, 2009, *available at* assets.opencrs.com/rpts/R40725_20090724.pdf.

[69]. U.S. Const. art. I, § 8, cl. 1.

[70]. Articles of Confederation of 1777, art. VIII.

[71]. Scott A. Taylor, *The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians*, 91 Marq. L. Rev. 917, 925 (2008).

[72] . *Id.*

[73]. *Secretaries of the Treasury: Alexander Hamilton*, U.S. Department of the Treasury, http://www.ustreas.gov/education/history/secretaries/ahamilton.shtml (last visited Feb. 4, 2010).

[74]. The Federalist No. 21 (Alexander Hamilton).

[75]. The Federalist No. 30 (Alexander Hamilton).

[76]. *See* Jeffrey T. Renz, *What Spending Clause, (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. Marshall L. Rev. 81 (1999).

[77]. *Id*. at 103.

[78]. *Id*. at 108-09.

[79]. United States v. Butler, 297 U.S. 1 (1936).

[80]. *Id*. at 68.

[81]. *Id.* at 66.

[82]. *See* Christopher O'Neill, *Legislating Under the Influence: Are Federal Highway Incentives Enough to Induce State Legislatures to Pass a 0.08 Blood Alcohol Concentration Standard?*, 28 Seton Hall Legis. J. 415, 424 (2004).

[83]. Baily v. Drexel Furniture Co., 259 U.S. 20 (1922).

[84]. *Id*. at 34.

[85]. *Id* at 38-39.

[86]. *Id*.

[87]. David B. Rivkin Jr. & Lee A. Casey, *Illegal Health Reform*, Wash. Post, Aug. 22, 2009, at A15.

[88]. U.S. Const. art. I, § 9, cl. 4.

[89]. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

[90]. *Id.* at 583.

[91]. U.S. Const. amend. XVI.

[92]. U.S. Const. art. I, § 9, cl. 4.

[93]. George Stephanopoulos, *George's Bottom Line*, ABC News, Sept. 20, 2009, http://blogs.abcnews.com/george/2009/09/obama-mandate-is-not-a-tax.html (last visited Feb. 4, 2010).

[94]. *Id.*

[95]. *Id.*

[96]. Phil Galewitz & Christopher Weaver, *Health Bills Could Expand IRS Role*, USA Today, Jan. 4, 2010, at 5A.

[97]. S. 1796 § 1301.

[98]. Stephanopoulos, *supra* note 115.

[99]. Matt Cover, *Sen. Sanders: Constitutional Authority for Congress' Health Insurance Mandate 'Probably' Same as Medicare*, NCSNEWS.COM, Dec. 24, 2009, http://www.cnsnews.com/news/article/59002 (last visited Feb. 4, 2009).

[100]. Medicare Eligibility Tool, http://www.medicare.gov/MedicareEligibility/ (last visited Jan. 7, 2010).

[101]. Ctrs. for Medicare & Medicaid Servs., How is Medicare Funded? (2009), *available at* http://www.medicare.gov/Publications/Pubs/pdf/11396.pdf.

[102]. Helvering v. Davis, 301 U.S. 619 (1937).

[103]. Hall, *supra* note 82, at 43.

[104]. *Id*.

[105]. Baily v. Drexel Furniture Co., 259 U.S. 20, 38 (1922)(“But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment.”).

[106]. *Davis*, 301 U.S. at 634.

[107]. Hall, *supra* note 82, at 43.

[108]. Rivkin & Casey, *supra* note 109.

[109]. U.S. Const. art. I, § 9, cl. 4.

[110]. S. 1796 § 1301.

[111]. Black's Law Dictionary 646 (9th ed. 2009).

[112]. *A Healthy Debate*, *supra* note 75, at 116.

[113]. *Id.* at 111.

[114]. Ernest S. Christian & Betty Jo Christian, *Is Obama's Tax on Health Care Constitutional?*, TAX.COM,

http://www.tax.com/taxcom/features.nsf/Articles/5B9094E6AED5EF718525764900822CC8?OpenDocument.

[115]. The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. *See* http://www.fed-soc.org/.

[116]. Peter Urbanowicz & Dennis G. Smith, *Constitutional Implications of an "Individual Mandate" in Health Care Reform*, The Federalist Society for Law & Public Policy Studies, July 10, 2009, http://www.fed-soc.org/publications/pubid.1502/pub_detail.asp (follow "Constitutional Implications of an 'Individual Mandate' in Health Care Reform" hyperlink).

[117]. *Id.*

[118]. Affordable Health Care for America Act, H.R. 3962, 111th Cong. §501(a)(as passed by the House, Nov. 7, 2009).

[119]. H.R. 3962, §501(b)(1)(A).

[120]. *A Healthy Debate*, *supra* note 75, at 110.

[121]. Barnett, Stewart & Gaziano, *supra* note 74.

[122]. U.S. Const. art. I, § 9, cl. 4.

[123]. Barnett, Stewart & Gaziano, *supra* note 74.

[124]. Ceci Connolly, *Like Car Insurance, Health Coverage May Be Mandated*, Wash. Post, July 22, 2009, at A01.

[125]. *See* Car and Motorcycle Insurance Laws, Edgar Snyder & Associates, http://www.edgarsnyder.com/car-accident/insurance-laws/ (last visited Nov. 15, 2009).

[126]. The Federalist No. 45 (James Madison).

[127]. Fuhrmans, *supra* note 14.

[128]. Martha Bebinger, *Mass. High Court Backs Health Insurance Mandate*, wbur.org, Mar. 12, 2009, http://www.wbur.org/2009/03/12/mass-high-court-backs-health-insurance-mandate.

[129]. The Federalist No. 45 (James Madison).

[130]. South Dakota v. Dole, 483 U.S. 203 (1987).

[131]. *Id.* at 205.

[132]. *Id.* at 207.

[133]. *Id.*

[134]. *Id.*

[135]. *Id*.(citing Pennhurst State Sch. and Hosp. v. Halterman, 451 U.S. 1, 17 (1981)).

[136]. *Dole*, 483 U.S. at 207-08 (citing Mass. v. U.S., 435 U.S. 444, 461 (1978)).

[137]. *Dole*, 483 U.S. at 208.

[138]. *Id*. at 209.

[139]. *Dole*, 483 U.S. at 210-11 (citing Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

[140]. *Dole*, 483 U.S. at 211.

[141]. Reeves T. Bull, *The Virtue of Vagueness: A Defense of South Dakota v. Dole*, 56 Duke L.J. 279, 292 (2006).

[142]. Monica Davey*, Health Care Overhaul and Mandatory Coverage Stir States' Rights Claims,*

N.Y. Times, Sept. 29, 2009, at A25.

[143]. *Massachusetts: 26% Consider State's Health Care Reform a Success*, Rasmussen Reports, http://www.rasmussenreport.s.com/public_content/politics/general_state_surveys/massachusetts/massachusetts_26_consider_state_s_health_care_reform_a_success

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