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# Mandatory Insurance Is Unconstitutional

## Why an individual mandate could be struck down by the courts.

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Federal legislation requiring that every American have health insurance is part of all the major health-care reform plans now being considered in Washington. Such a mandate, however, would expand the federal government's authority over individual Americans to an unprecedented degree. It is also profoundly unconstitutional.

An individual mandate has been a hardy perennial of health-care reform proposals since HillaryCare in the early 1990s. President Barack Obama defended its merits before Congress last week, claiming that uninsured people still use medical services and impose the costs on everyone else. But the reality is far different. Certainly some uninsured use emergency rooms in lieu of primary care physicians, but the majority are young people who forgo insurance precisely because they do not expect to need much medical care. When they do, these uninsured pay full freight, often at premium rates, thereby actually subsidizing insured Americans.

The mandate's real justifications are far more cynical and political. Making healthy young adults pay billions of dollars in premiums into the national health-care market is the only way to fund universal coverage without raising substantial new taxes. In effect, this mandate would be one more giant, cross-generational subsidy—imposed on generations who are already stuck with the bill for the federal government's prior spending sprees.

Politically, of course, the mandate is essential to winning insurance industry support for the legislation and acceptance of heavy federal regulations. Millions of new customers will be driven into insurance-company arms. Moreover, without the mandate, the entire thrust of the new regulatory scheme—requiring insurance companies to cover pre-existing conditions and to accept standardized premiums—would produce dysfunctional consequences. It would make little sense for anyone, young or old, to buy insurance before he actually got sick. Such a socialization of costs also happens to be an essential step toward the single payer, national health system, still stridently supported by large parts of the president's base.

The elephant in the room is the Constitution. As every civics class once taught, the federal government is a government of limited, enumerated powers, with the states retaining broad regulatory authority. As James Madison explained in the Federalist Papers: "[I]n the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects." Congress, in other words, cannot regulate simply because it sees a problem to be fixed. Federal law must be grounded in one of the specific grants of authority found in the Constitution.

These are mostly found in Article I, Section 8, which among other things gives Congress the power to tax, borrow and spend money, raise and support armies, declare war, establish post offices and regulate commerce. It is the authority to regulate foreign and interstate commerce that—in one way or another—supports most of the elaborate federal regulatory system. If the federal government has any right to reform, revise or remake the American health-care system, it must be found in this all-important provision. This is especially true of any mandate that every American obtain health-care insurance or face a penalty.

The Supreme Court construes the commerce power broadly. In the most recent Commerce Clause case, *Gonzales v. Raich* (2005), the court ruled that Congress can even regulate the cultivation of marijuana for personal use so long as there is a rational basis to believe that such "activities, taken in the aggregate, substantially affect interstate commerce."

But there are important limits. In *United States v. Lopez* (1995), for example, the Court invalidated the Gun Free School Zones Act because that law made it a crime simply to possess a gun near a school. It did not "regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity." Of course, a health-care mandate would not regulate any "activity," such as employment or growing pot in the bathroom, at all. Simply being an American would trigger it.

Health-care backers understand this and—like Lewis Carroll's Red Queen insisting that some hills are valleys—have framed the mandate as a "tax" rather than a regulation. Under Sen. Max Baucus's (D., Mont.) most recent plan, people who do not maintain health insurance for themselves and their families would be forced to pay an "excise tax" of up to \$1,500 per year—roughly comparable to the cost of insurance coverage under the new plan.

But Congress cannot so simply avoid the constitutional limits on its power. Taxation can favor one industry or course of action over another, but a "tax" that falls exclusively on anyone who is uninsured is a penalty beyond Congress's authority. If the rule were otherwise, Congress could evade all constitutional limits by "taxing" anyone who doesn't follow an order of any kind—whether to obtain health-care insurance, or to join a health club, or exercise regularly, or even eat your vegetables.

This type of congressional trickery is bad for our democracy and has implications far beyond the health-care debate. The Constitution's Framers divided power between the federal government and states—just as they did among the three federal branches of government—for a reason. They viewed these structural limitations on governmental power as the most reliable means of protecting individual liberty—more important even than the Bill of Rights.

Yet if that imperative is insufficient to prompt reconsideration of the mandate (and the approach to reform it supports), then the inevitable judicial challenges should. Since the 1930s, the Supreme Court has been reluctant to invalidate "regulatory" taxes. However, a tax that is so clearly a penalty for failing to comply with requirements otherwise beyond Congress's constitutional power will present the question whether there are any limits on Congress's power to regulate individual Americans. The Supreme Court has never accepted such a proposition, and it is unlikely to accept it now, even in an area as important as health care.

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