# Federalism & Separation of Powers

## The Individual Health Insurance Mandate and the Constitutional Text

*By Ilya Somin**

The health care bill recently passed by Congress includes an "individual mandate" requiring most Americans to purchase health insurance. Beginning in 2014, most citizens and permanent residents will either be required to purchase health insurance that meets federally-mandated standards or pay a fine of up to $695 per year, which by 2016 will rise to a maximum of $750 per year.[1]

There is a heated debate over whether such a mandate is constitutional. Unfortunately, both sides have focused mostly on the implications of recent Supreme Court decisions. Critics argue that the mandate falls outside the scope of Congress' authority under those precedents,[2] while supporters claim that the case law supports their position.[3] Neither side has seriously considered the text and original meaning of the Constitution. Ultimately, however, the Constitution is more than what the Supreme Court says it is. Even if the text and original meaning aren't the only relevant considerations, they should be a part of the discussion. In this essay, I argue that the individual mandate goes beyond Congress' powers under the text and original meaning of the Constitution.

Since the 1930s, the Supreme Court has interpreted Congress' powers under the Commerce Clause in ways that go far beyond the text. However, courts could invalidate an individual health insurance mandate without upsetting longstanding major institutions of American government. Although it may be impossible or unwise to fully enforce textual limits on congressional power, we can prevent further undermining of constitutional constraints.

### I. The Health Care Mandate and the Commerce Clause

Defenders of the mandate's constitutionality usually cite Congress' powers under the Commerce Clause as the main support for their position.[4] The text of the interstate Commerce Clause grants Congress the power to regulate "Commerce . . . among the several states."[5] In ordinary usage, the word "commerce" generally refers to the exchange of goods or services, not to any and all activity that might have an effect on such exchange.[6]

Various Supreme Court precedents hold that Congress has broad power to regulate activities that have a "substantial effect" on interstate commerce, even if they don't count as interstate commerce themselves.[7] The purchase of health insurance clearly has an impact on interstate commerce, and thus might fall within the scope of the "effects test." However, the test is at odds with the constitutional text. If the Commerce Clause really gave Congress the power to regulate any activity that merely affects interstate commerce, most of Congress' other powers listed in Article I of the Constitution would be redundant. For example, the very same phrase that enumerates Congress' power to regulate interstate commerce also gives it the power to regulate "Commerce with foreign Nations" and "with the Indian tribes." Foreign trade and trade with Indian tribes (which were a much more important part of the economy at the time of the Founding than they are today) clearly have major effects on interstate trade. Yet these two powers are separately enumerated, which strongly suggests that the power to regulate interstate commerce doesn't give Congress the power to regulate any activity that merely has an effect—substantial or otherwise—on that commerce.

The original understanding of the Commerce Clause is consistent with this common-sense interpretation of the text. In every instance where the word "commerce" was used at the Constitutional Convention, the ratification debates, and in the *Federalist Papers,* it was in the narrow sense indicating trade or exchange.[8] Even Alexander Hamilton, one of the Founding Fathers most committed to a broad interpretation of federal power, repeatedly construed the meaning of "commerce" in this way.[9]

The individual health insurance mandate violates the text and original meaning of the Commerce Clause in two ways. First, nearly all purchases of health insurance take place within the confines of a single state. Indeed, a combination of state and federal law makes it illegal to purchase health insurance across state lines.[10] Thus, the health insurance market, as currently regulated, is not "Commerce . . . among the *several* states," but merely commerce within a *single* state.[11]

Second, and even more important, the health insurance mandate goes beyond "regulating" preexisting "commerce" by forcing people to engage in commercial transactions even if they had made no previous effort to buy health insurance. The power to regulate a preexisting activity X is not the same thing as a power to force people to engage in X when they weren't doing so before. This simple textual point is also supported by the original meaning; there is no evidence that the framers or ratifiers of the Constitution ever envisioned that the power to regulate interstate commerce could be used to force people to engage in commerce, interstate or otherwise. If they had attributed such a meaning to the Clause, the Constitution would probably never have been ratified, since many state governments would have feared that Congress could force their residents to purchase the products of other states, thus creating monopolies over important markets.

This crucial distinction undercuts claims that the individual mandate is similar to decisions upholding Congress' power to forbid racial discrimination by commercial establishments such as restaurants and hotels.[12] These federal antidiscrimination laws applied to preexisting businesses already engaged in commercial activity in the regulated industry. By contrast, individuals who do not choose to purchase health insurance are not thereby participating in the insurance business. The health insurance mandate is more analogous to a statute that requires individuals to patronize a restaurant or hotel even if they had no previous intention of doing so.

Some argue that those who choose not to purchase health insurance are not simply "doing nothing." For example, Jack Balkin writes that:

> Critics charge that . . . people [who do not buy insurance] are not engaged in any activity that Congress might regulate; they are simply doing nothing. This is not the case. Such people actually self-insure through various means. When uninsured people get sick, they rely on their families for financial support, go to emergency rooms (often passing costs on to others), or purchase over-the-counter remedies. They substitute these activities for paying premiums to health insurance companies.[13]

However, the individual mandate is not contingent on engaging in any of these alternative activities. It applies even to those uninsured individuals who never get sick enough to rely on their families or go to emergency rooms. In addition, people who do these other things (with the possible exception of purchasing over-the-counter remedies) are still not engaged in commercial activity.

Congress could potentially have strengthened the bill's constitutional standing by limiting the mandate only to those people who get sick and report to emergency rooms or purchase over-the-counter medicine.[14] But that approach would almost certainly have been a political nonstarter since it could easily have been denounced by opponents as a cruel imposition on the sick.

## II. The Spending Clause

Some argue that the constitutionality of the individual mandate is justified by the Spending Clause, which gives Congress the power to impose taxes to "pay the Debts and provide for the common Defence and general Welfare of the United States."[15] They contend that a mandate could be justified as a "tax" authorized by the clause's provision allowing taxes to provide for "the general welfare" because it imposes a financial penalty on those who refuse to comply.[16]

This argument is vulnerable to many of the same textual objections as the Commerce Clause claim. If accepted, it renders most of the rest of Congress' powers under Article I redundant because it would enable Congress to control virtually any activity merely by imposing a financial penalty on anyone who refuses to comply. Presumably, it could then impose criminal sanctions on anyone who refused to pay the penalty. Thus, there would be no need for a congressional power to regulate interstate or foreign commerce, because Congress could regulate them under the Spending Clause. Indeed, this broad interpretation of "general welfare" even renders the rest of the Spending Clause itself superfluous. If the General Welfare Clause gives Congress the power to tax and spend for any purposes it likes, surely that includes the power to do so for purposes of providing for "the common defence" and paying the national debt. Yet these powers are separately enumerated, which implies that the General Welfare Clause must not be interpreted so broadly as to make these other powers redundant.[17]

Interestingly, President Obama appears to disagree with academic defenders of the mandate who claim that it is a tax. In a September ABC News interview, he emphasized that "for us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase."[18] Unlike some of his defenders, the President appears to believe that the individual mandate is not a tax, but a penalty for noncompliance with a regulatory requirement.

Defenders of the health insurance mandate's constitutionality generally ignore the text and original meaning of the Constitution, relying almost entirely on precedent to bolster their position.[19] Yet the President, members of Congress, and Supreme Court Justices have taken oaths to uphold the Constitution, not merely what judicial precedent says it means.

## III. Striking Down the Mandate Does not Require Invalidation of the Entire Post-New Deal State

Since the 1930s, the Supreme Court has upheld as constitutional numerous exercises of congressional power that go beyond the text of the Commerce Clause. A variety of major regulatory statutes rely on these precedents, including the National Labor Relations Act, agricultural regulations, and many others.[20] Some undoubtedly fear that relying on the text and original meaning to strike down an individual health insurance mandate would require invalidation of the entire panoply of post-New Deal expansions of federal power.

Overruling some of the New Deal-era precedents might not be such a terrible tragedy.[21] Regardless, striking down an individual mandate would not require courts to go that far. The mandate departs even farther from Congress' textually enumerated powers than do the various post-New Deal economic programs previously upheld by the Court. Even the most expansive of these programs did not compel individuals to engage in economic transactions. Rather, they sought to regulate individuals' preexisting participation in commerce, such as in the market for labor,[22] the market for agricultural products,[23] or the restaurant and motel markets.[24] Many of the great post-New Deal regulatory programs departed from the text by regulating economic activities that did not actually involve commerce across state lines. But the individual mandate goes a step further than this by regulating conduct that doesn't involve any preexisting participation in commerce at all.

To say that an individual mandate can be invalidated without undercutting major longstanding government programs is not the same thing as saying that existing precedent can't be plausibly interpreted to support its constitutionality. For example, the Supreme Court's most expansive Commerce Clause precedent, *Gonzales v. Raich*, could be read in that way.[25] However, the reasoning of the Court's precedents is distinct from the programs those precedents uphold. The latter can be preserved without necessarily endorsing all the most expansive language of the former and without giving Congress virtually unlimited power. Even *Raich*,[26] which endorsed Congress' power to forbid the possession of homegrown medical marijuana that had never been sold in any market or crossed state lines, did not uphold a program that required people to participate in economic transactions that they had previously avoided. And, obviously, a decision overruling *Raich* or cutting back on its

reasoning would not imperil the major pillars of the post-New Deal regulatory state.

Perhaps the constitutional text can be overridden in order to uphold longstanding government programs whose abolition would be costly or politically infeasible. But there is no reason to ignore it merely to avoid disturbing the most indefensible elements of the Court's reasoning in previous decisions. It may be undesirable or at least politically impossible for the Court to fully enforce the textual limits on Congress' Article I powers. Yet it is also dangerous to use this reality as a justification for giving Congress a virtual blank check to wield unconstrained power.

Judicially-enforced limits on federal power protect many important benefits of a federal system, including competition between state governments and the ability of citizens to "vote with their feet" to escape policies that oppress them or harm their interests.[27] Contrary to claims that such limits undercut democracy, they can actually enhance democratic control over government by limiting the range of federal policies that overburdened voters have to monitor, and by enhancing citizens' abilities to vote with their feet as well as at the ballot box.[28]

An individual mandate requiring the purchase of health insurance exceeds Congress' powers under the Constitution. And courts can strike it down without imperiling any major long-established government programs.

**Endnotes**

1 *Proposed Changes in the Final Health Care Bill*, N.Y. Times, Mar. 22, 2010, *available at* http://www.nytimes.com/interactive/2010/03/19/us/politics/20100319-health-care-reconciliation.html. American Indians, people with religious exemptions, and the very poor are exempt from the mandate. *Id.*

2 *See, e.g.,* Legal Memorandum from Randy E. Barnett, Nathaniel Stewart & Todd Gaziano, Heritage Foundation, *Why the Personal Mandate to Ban Health Insurance is Unprecedented and Unconstitutional* at 6-8, Dec. 9, 2009, *available at* http://www.heritage.org/Research/LegalIssues/lm0049es.cfm; David B. Rivkin, Jr. & Lee Casey, *Mandatory Insurance Is Unconstitutional: Why an Individual Mandate Could be Struck Down by the Courts,* Wall St. J., Sept. 18, 2009.

3 *See, e.g.,* Erwin Chemerinsky, *Health Care Reform is Constitutional*, Politico, Oct. 23, 2009, *available at* http://www.politico.com/news/stories/1009/28620.html; Ruth Marcus, *An 'Illegal' Mandate? No*, Wash. Post, Nov. 27, 2009; Robert A. Schapiro, *Federalism is no Bar to Health Care Reform*, Atlanta Journal-Constitution, Nov. 2, 2009.

4 *See, e.g.,* works cited in note 3 above.

5 U.S. Const. art. I, § 8, cl. 3.

6 *See, e.g.*, The Random House Dictionary 176 (1984) (defining "commerce" as "an interchange of goods").

7 *See, e.g.,* United States v. Lopez, 514 U.S. 549, 558-59 (1995) (summarizing case law); *see also* United States v. Morrison, 529 U.S. 598, 609 (2000).

8 *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause,* 68 U. Chi. L. Rev. 101, 112-25 (2001).

9 *Quoted in id.* at 116.

10 *See, e.g.,* Henry Butler & Larry Ribstein, *The Single License Solution*, Regulation, Winter 2008-2009, at 36 (describing the current regulatory structure under which the federal government exempts health insurance companies from federal antitrust law and states forbid interstate insurance purchases).

11 U.S. Const. art. I, § 8, cl. 3 (emphasis added).

12 *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding regulation of discrimination against customers of a commercial restaurant); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding federal ban on discrimination against customers of a hotel serving interstate travelers). These cases are cited as justifying the constitutionality of the health insurance mandate in Chemerinsky, *supra* note 3.

13 Posting of Jack Balkin to Balkinization, *If You Can't Stop the Bill, Just Have Another* Bush v. Gore, Mar. 21, 2010, http://balkin.blogspot.com/2010/03/if-you-cant-stop-bill-just-have-another.html (Mar. 21, 2010).

14 Though, in my view, such a bill would still have been unconstitutional because it departs from the constitutional text for reasons discussed above.

15 U.S. Const. art. I, § 8, cl. 1.

16 *See, e.g.,* Jack M. Balkin, *The Constitutionality of an Individual Mandate for Health Insurance*, 158 U. Penn. L. Rev. PENNumbra 102, 102-104 (2009).

17 For a more detailed discussion of this point, see Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 Geo. L.J. 461, 489-94 (2002).

18 Quoted in George Stephanopoulos, *Obama: Mandate is Not a Tax*, ABCNews, Sept. 20, 2009, *available at* http://blogs.abcnews.com/george/2009/09/obama-mandate-is-not-a-tax.html.

19 *See, e.g.,* works cited in note 3.

20 *See, e.g.,* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding National Labor Relations Act regulation of employment relations); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding legislation forbidding farmers to grow more wheat than is allowed under federal government quotas).

21 *Cf.* Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 Wm. & Mary L. Rev. 595 (2003) (describing how many of the policies upheld as a result of the New Deal revolution in Commerce Clause doctrine caused great harm and may have made the Great Depression worse); Harold Cole & Lee Ohanian, *New Deal Policies and the Persistence of the Great Depression*, 112 J. Pol. Econ. 779 (2004) (showing that some of these policies increased unemployment and may have prolonged the Depression by as much as several years).

22 *See, e.g.,* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Darby, 312 U.S. 100 (1941) (upholding Fair Labor Standards Act regulation of employment conditions).

23 *See, e.g.,* Wickard v. Filburn, 317 U.S. 111 (1942).

24 *See* cases cited in note 12.

25 *See* Posting of Ilya Somin to Volokh Conspiracy, *Does a Federal Mandate Requiring the Purchase of Health Insurance Exceed Congress' Powers Under the Commerce Clause?*, http://volokh.com/archives/archive_2009_09_20-2009_09_26.shtml#1253489281 (Sept. 20, 2009) (discussing *Gonzales v. Raich*, 545 U.S. 1 (2005)). For explanations of ways that *Raich* can be distinguished from a case challenging the mandate, see Barnett et al., *supra* note 2, at 4-5, 7-9. I have criticized the reasoning of the *Raich* decision in detail in Ilya Somin, Gonzales v. Raich: *Federalism as a Casualty of the War on Drugs,* 15 Cornell J.L. & Pub. Pol'y 507 (2006).

26 545 U.S. 1 (2005).

27 *See* John McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System,* 99 Nw. U. L. Rev. 89 (2004).

28 Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the "Central Obsession" of Constitutional Theory,* 89 Iowa L. Rev. 1287, 1329-51 (2004).