DOES THE CONSTITUTION CONSTRAIN CONGRESSIONAL JUDGMENT?: CONSTITUTIONAL PROBLEMS WITH HEALTH INSURANCE REFORM LEGISLATION

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INTRODUCTION

> "We do not take an oath to balance the budget, and we do not take an oath to bring about universal peace, but we do take an oath to protect and defend the Constitution of the United States."[1]
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> —Senator Daniel Patrick Moynihan

In April 1992, Senator Alfonse D'Amato (R-NY) offered an amendment to the congressional budget resolution.[2] His Democratic colleague from New York, Senator Daniel Patrick Moynihan, made the statement quoted above while making a point of order[3] that the D'Amato amendment was unconstitutional.[4] He "appeal[ed] to the Constitution" and asked

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1. 138 CONG. REC. 9313 (1992) (statement of Sen. Moynihan).

2. Amend. 1784 S. Con. Res. 106, 102d Cong. (1992). The Senate voted 43-47 against the amendment. S. Amdt. 1784 Status, Libr. of Cong., http://thomas.loc.gov/cgi-bin/bdquery/z?d102:SP01784: (last visited Mar. 3, 2010).

3. Rule XX of the Standing Rules of the Senate allows a Senator to raise a question of order which "unless submitted to the Senate, shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate." Comm. on Rules & Admin., Rules of the Senate, http://rules.senate.gov/public/index.cfm?p=ruleXX (last visited Feb. 2, 2010) [hereinafter Rules of the Senate]. Tabling such an appeal "shall be held as affirming the decision of the Presiding Officer." *Id.*

4. 138 CONG. REC. 9313 (1992). "Under Senate precedents, the presiding officer may not rule on a constitutional point of order and instead must submit the point of order to the full Senate for a vote." BETSY PALMER, CHANGING SENATE RULES OR PROCEDURES: THE 'CONSTITUTIONAL' OR 'NUCLEAR' OPTION 6 (Cong. Research Serv., CRS Report for Congress Order Code RL32684, Apr. 5, 2005), *available at* http://www.thecapitol.net/Research/images/CRS-RL32684.pdf. The Senate's 45-45

"Senators to remember their oaths" because "our first responsibility lies . . . with the Constitution that created us and which we are sworn to uphold and protect."[5] In other words, Senator Moynihan argued, the Constitution comes first. It empowers Congress to do many things for the American people, but it also sets limits on the exercise of that power. No matter what a Senator thinks of the policy behind a bill or the politics surrounding it, the Constitution comes first.

Senator Moynihan not only made this argument rhetorically, but his point of order also demonstrated that individual Senators, the Senate, and Congress as a whole must ensure that proposed legislation is consistent with the Constitution. Applying that axiom, this article examines the health insurance reform bill passed by the United States Senate[6] and

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vote on Senator Moynihan's point of order meant that it was not well taken. 138 CONG. REC. 9314 (1992). According to the Congressional Research Service, the Senate voted on sixteen constitutional points of order between 1989 and December 2009. VALERIE HEITSHUSEN, CONSTITUTIONAL POINTS OF ORDER IN THE SENATE 4 (Cong. Research Serv., CRS Report for Congress Order Code R40948, Jan. 6, 2010). One was tabled, six were sustained, and the remaining seven were not well taken. *Id.*

5. 138 CONG. REC. 9313 (1992) (statement of Sen. Moynihan). As prescribed, Senators take the following oath: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." 5 U.S.C. § 3331 (2006). Rule III of the Standing Rules of the Senate also requires Senators to subscribe to this oath by signing a printed copy. Rules of the Senate, *supra* note 3.

6. On November 7, 2009, the House voted 220-215 to pass H.R. 3962, the Affordable Health Care for America Act. H.R. 3962 Status, Libr. of Cong., http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03962:@@@R (last visited Mar. 3, 2010). On December 24, 2009, the Senate voted 60-39 to pass H.R. 3590, the Patient Protection and Affordable Care Act. H.R. 3590 Status, Libr. of Cong, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03590:@@@R (last visited Mar. 3, 2010). This Article was submitted for publication in January 2010 while the process of reconciling these two bills was underway. The election of Senator Scott Brown (R-MA) on January 19, 2010 may have complicated the passage of health insurance reform legislation because it deprived Democrats of the 60-vote margin they used to invoke cloture on the bill they passed. *See* Shailagh Murray & Lori Montgomery, *Democrats ponder health-care reform plans in wake of Massachusetts Senate race*, WASH. POST, Jan. 20, 2010, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/01/19/AR2010011904426.html. The day after that election, the Wall Street Journal said that the message was to "shelve ObamaCare" while the Boston Globe said that "the results need not—must not—stop the fundamental reform of the nation's health insurance system." Editorial, *Boston Tea Party*, WALL ST. J., Jan. 20, 2010, http://online.wsj.com/article/SB10001424052748703837004577

outlines some of its provisions that raise real constitutional concerns.[7]

I. "RECURRING TO PRINCIPLES"

In *The Federalist* No. 39, James Madison explained the nature of the republican form of government by "recurring to principles."[8] Ending in the right place requires starting in the right place, with some of the basic principles shaping the system of government within which Congress is considering health insurance reform legislation. Abandoning any or all of these principles along the way will virtually guarantee coming up with the wrong answer.

The first principle is that liberty requires limits on government power; it always has and it always will. The nature of human beings is such that liberty cannot exist without at least some order provided by government. As James Madison put it in *The Federalist* No. 51: "If men were angels, no government would be necessary."[9] But the nature of government is such that liberty cannot exist without limits on government. James Madison went on to observe: "If angels were to

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5013120573610774.html; Editorial, *But Health Reform Still Crucial*, BOSTON GLOBE, Jan. 20, 2010, at 12, *available at* http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2010/01/20/but_health_reform_still_crucial/. On March 21, 2010, the House of Representatives passed H.R. 3590, the Patient Protection and Affordable Care Act, which was signed by President Barack Obama on March 23, 2010. Pub. L. No. 111-148, 124 Stat. 119 (2010).

7. Senator John Ensign (R-NV) made a point of order that H.R. 3590, the Patient Protection and Affordable Care Act, was unconstitutional because it exceeded Congress's enumerated powers and violated the Fifth Amendment. 155 CONG. REC. S13830–31 (daily ed. Dec. 23, 2009) (statement of Sen. Ensign). The Senate voted 39-60 against his point of order. 155 CONG. REC. S13830–31 (daily ed. Dec. 23, 2009) (roll call vote). Senator Kay Bailey Hutchison (R-TX) also made a point of order that the bill was unconstitutional because it violated the Tenth Amendment. 155 CONG. REC. S13832 (daily ed. Dec. 23, 2009) (statement of Sen. Hutchison). The Senate similarly voted 39-60 against her point of order. 155 CONG. REC. S13832 (daily ed. Dec. 23, 2009) (roll call vote). Prior to the "summit" on healthcare reform held on February 24, 2010, President Obama unveiled an eleven-page proposal which uses the Senate bill as its "basic framework." Alec MacGillis & Amy Goldstein, *Obama Offers New Health-Care Reform Proposal*, WASH. POST, Feb. 23, 2010, at A01. The analysis in this Article focuses primarily on the bill passed by the Senate on December 24, 2009, but where appropriate will also make reference to this proposal, which is available at http://www.whitehouse.gov/health-care-meeting/proposal [hereinafter President's Proposal].

8. THE FEDERALIST No. 39, at 20 (James Madison) (J. & A. McLean 1788).

9. THE FEDERALIST No. 51, at 118 (James Madison) (J. & A. McLean 1788).

govern men, neither external nor internal controls on government would be necessary."[10]

These controls include a written Constitution that delegates certain powers to the federal government and enumerates the powers delegated to Congress. The second principle is that Congress must establish, rather than assume, that the Constitution allows passage of particular legislation.[11] The Tenth Amendment lays out the formula: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[12] In other words, the federal government needs constitutional permission to act while the states need constitutional prohibition to be kept from acting.

"The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."[13] In *McCulloch v. Maryland*, Chief Justice John Marshall wrote that the federal government "is acknowledged by all, to be one of enumerated powers. The principle that it can exercise only the powers granted to it . . . is now universally admitted."[14] Nearly two centuries later, the Supreme Court reaffirmed that among the "first principles" of our form of government is that "[t]he Constitution created a Federal Government of enumerated powers."[15] As

10. *Id.*

11. I am a cosponsor of S. 1319, the Enumerated Powers Act, which would require that every bill "shall contain a concise explanation of the specific constitutional authority relied upon for the enactment of each portion of that Act. The failure to comply with this section shall give rise to a point of order in either House of Congress." S. 1319, 111th Cong. § 102a (2009). For further description and analysis of this bill, see Andrew M. Grossman, *The Enumerated Powers Act: A First Step Toward Constitutional Government*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM, June 23, 2009, *available at* http://www.heritage.org/research/legal issues/lm0041.cfm.

12. U.S. CONST. amend. X.

13. Marbury v. Madison, 5 U.S. 137, 176 (1803).

14. McCulloch v. Maryland, 17 U.S. 316, 405 (1819).

15. United States v. Lopez, 514 U.S. 549, 552 (1995). This principle is fundamental to the nature of the American system of constitutional government and has been recognized from the founding of the Republic. *See* Martin v. Hunter's Lessee, 14 U.S. 304, 326 (1816) ("The government . . . of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."); *see also* Alden v. Maine, 527 U.S. 706, 739 (1999) (quoting principle stated in *Martin*);

such, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."[16]

The third principle follows necessarily from the first two. For the Constitution to be able to limit the power of the federal government generally and of Congress specifically, the Constitution cannot mean whatever the federal government wants it to mean. The Constitution, after all, created Congress,[17] not the other way around. If Congress could determine the meaning of the Constitution, Congress could define its own power.[18] The Constitution could not be a con-

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City of Boerne v. Flores, 521 U.S. 507, 516 (1997) ("Under our Constitution, the Federal Government is one of enumerated powers."); Carter v. Carter Coal Co., 298 U.S. 238, 291 (1936) ("The ruling and firmly established principle is that the powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers."); Newberry v. United States, 256 U.S. 232, 249 (1921) (quoting principle stated in *Martin*); Kansas v. Colorado, 206 U.S. 46, 87 (1907) ("[T]he constant declaration of this court from the beginning is that this [Federal] government is one of enumerated powers."); Hepburn v. Griswold, 75 U.S. 603, 611 (1870) ("But the Constitution is the fundamental law of the United States. By it the people have created a government, defined its powers, prescribed their limits, distributed them among the different departments, and directed, in general, the manner of their exercise. No department of the government has any other powers than those thus delegated to it by the people.").

16. United States v. Morrison, 529 U.S. 598, 607 (2000); *see also* Dorr v. United States, 195 U.S. 138, 140 (1904) ("It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal government."); United States v. Harris, 106 U.S. 629, 635 (1883) ("[T]he government of the United States is one of delegated, limited, and enumerated powers. Therefore, every valid act of Congress must find in the Constitution some warrant for its passage.") (citations omitted).

17. *See* O'Donoghue v. United States, 289 U.S. 516, 530 (1933) ("The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands.") (citations omitted).

18. I have addressed the proper approach to interpreting and applying the Constitution in the context of the judicial selection process. *See, e.g.*, Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL'Y 1035 (2009); Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803; *see also* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (Liberty Fund 1997) (1977); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1991); *Speech in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (Rowman & Littlefield 1994) (1986).

trol on government, as Madison argued,[19] or provide limits that cannot be mistaken or forgotten, as Chief Justice Marshall wrote,[20] if it means whatever Congress wants it to mean. In that case, Alexander Hamilton would have made no sense to argue that legislation "contrary to the manifest tenor of the Constitution [is] void."[21]

Since the "manifest tenor" of any document comes from the meaning of its words, the Constitution cannot be simply the form of its words. The Constitution, which declares itself to be the "supreme Law of the Land,"[22] is the substance of its meaning. As Judge Robert Bork has explained: "What does it mean to say that the words in a document are law? One of the things it means is that the words constrain judgment. They control judges every bit as much as they control legislators, executives, and citizens."[23] It is the manifest tenor, or the substantive meaning, of the Constitution that must constrain Congress's judgment and to do that, the Constitution's meaning must come from the same authority that supplied the words themselves, namely, the people of the United States. They "ordain[ed] and establish[ed]"[24] the Constitution which, Hamilton wrote, represents "the intention of the people."[25] Quoting George Washington, the Rhode Island Constitution declares that "the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all."[26] Words without meaning can oblige no one. To be the Constitution, it must not only say what the people wanted it to say, but it must mean what the people wanted it to mean. Only in this way can the Constitution actually represent the people's in-

19. THE FEDERALIST No. 51, *supra* note 9, at 118.

20. Marbury v. Madison, 5 U.S. 137, 176 (1803).

21. THE FEDERALIST No. 78, at 293 (Alexander Hamilton) (J. & A. McLean 1788).

22. U.S. CONST. art.VI.

23. Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 824–25 (1986) (article derived from the Hon. Robert H. Bork, United States Court of Appeals for the District of Columbia, Address at the University of San Diego Law School (Nov. 18, 1985) (transcript available at http://www.fed-soc.org/resources/id.53/default.asp)).

24. U.S. CONST. pmbl.

25. THE FEDERALIST No. 78, *supra* note 21, at 294.

26. R.I. CONST. art. I, § 1.

tention and actually protect liberty by limiting government power.

Senator Moynihan's call to place the Constitution first echoed the earlier wisdom of Justice Hugo Black directed at his branch of government:

> I realize that it is far easier to substitute individual judges' ideas of 'fairness' for the fairness prescribed by the Constitution, but I shall not at any time surrender my belief that that document itself should be our guide, not our own concept of what is fair, decent, and right . . . . I prefer to put my faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of fairness of individual judges.[27]

Members of Congress must also put the Constitution first.

II. Applying the Principles

The three principles informing this examination of the health insurance reform legislation are that liberty requires limits on government power, that Congress must identify at least one of its powers enumerated in the Constitution as the basis for legislation, and that the Constitution does not mean whatever Congress wants it to mean. These principles counsel resistance to two temptations. Congress must resist the temptation to assume that the Constitution allows Congress to do whatever it wants and the temptation to ignore the question entirely by leaving it to the courts. The first temptation takes Congress's constitutional responsibility too lightly; the second abdicates it altogether.

The courts may be called upon to exercise judicial review, or "the power . . . to invalidate the acts of government officials as disallowed by the Constitution."[28] They may well be called upon to do so with regard to health insurance reform legislation.[29] The judicial branch, however, may exercise its power

27. In re Winship, 397 U.S. 358, 377–78 (1970) (Black, J., dissenting).

28. Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 Stan. L. Rev. 1019, 1020 (1992).

29. *See* Matt Canham, *If Congress Passes Bill, Court Fight Not Far Behind*, Salt Lake Trib., Jan. 19, 2010, http://www.sltrib.com/health/ci_14217433; Ben Pershing, *Some Foes of Health-Care Bill Hope Courts Will Stop Legislation*, Wash. Post, Jan. 3, 2010, at A3, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/01/02/AR2010010200620_pf.html.

only in the context of actual "Cases" or "Controversies"[30] brought to it by litigants. Because judges may not render advisory opinions in the absence of concrete cases,[31] there will be no judicial ruling on the constitutionality of a statute unless a case is brought properly raising that issue and meeting relevant procedural and jurisdictional requirements. Even then, judges may address a statute's constitutionality by considering different factors, using different standards, and for a different purpose than members of Congress would.[32] In this way, the judicial branch is reactive, rendering its judgments after the fact; the legislative branch must be proactive, rendering its judgments before legislation becomes law. That judgment cannot be made unless the matter is deliberately considered.

The possibility that a court may someday evaluate a statute's constitutionality is no substitute for Senators' duty today to evaluate whether a bill actually before them is constitutional. Senators take an oath to support and defend the Constitution, not to defer to the courts, and that duty is an

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30. U.S. CONST. art. III, § 2.

31. The Supreme Court's opposition to rendering advisory opinions began with expressing "some doubts" in Hayburn's Case, 2 U.S. 409, 412 (1792), and has become a virtually categorical rule especially on constitutional questions. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998) (stating that advisory opinions have been "disapproved by this Court from the beginning"); Clinton v. Jones, 520 U.S. 681, 700 (1997) ("[T]he judicial power to decide cases and controversies does not include the provision of purely advisory opinions . . . ."); Church of Scientology v. United States, 506 U.S. 9, 13 n.6 (1992) (stating that advisory opinions are "impermissible"); Mistretta v. United States, 488 U.S. 361, 385 (1989) ("In implementing this limited grant of [judicial] power, we have refused to issue advisory opinions . . . ."); Preiser v. Newkirk, 422 U.S. 395, 401 (1975) ("The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy . . . . [A] federal court has [no] power to render advisory opinions . . . ."); North Carolina v. Rice, 404 U.S. 244, 246 (1971) ("Early in its history, this Court held that it had no power to issue advisory opinions . . . ."); Hall v. Beals, 396 U.S. 45, 48 (1969) (declaring that the Court must "avoid advisory opinions on abstract propositions of law"); Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885) (dealing with an issue "purely as an hypothesis" or "pass[ing] upon the constitutionality of an act of Congress as an abstract question . . . [t]hat is not the mode in which this court is accustomed or willing to consider such questions").

32. Commentator Jacob Sullum writes that a decision by the Supreme Court that a statute is constitutional "does not mean that such a [statute] would be constitutional – i.e., that it *should* be upheld." Jacob Sullum, *Would a Federal Requirement to Buy Insurance Be Constitutional?*, REASON, Sept. 23, 2009, http://reason.com/blog/2009/09/23/would-a-federal-requirement-to.

ongoing, present one. As constitutional historian Charles Warren has written: "However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court."[33] Senator Moynihan's point of order and his appeal to Senators' own oath of office emphasized that they have an independent, current responsibility to ensure that legislation they consider is consistent with the Constitution.

A. Constitutional Issues Affecting Individuals and Businesses

1. The Individual Insurance Mandate

The provision in the Senate health insurance reform bill that has received the most constitutional attention and debate is the requirement that, beginning in 2014, individuals[34] must obtain a specific level of health insurance for themselves and their dependents.[35] Failure to do so would result in a penalty of up to $750 per year per individual.[36] While the penalty would be assessed and collected through the Internal Revenue Code,[37] failure to pay it would not result in any "criminal prosecution or penalty" or any lien or levy on property.[38] This mandate is the core of the legislation's plan for expanding health insurance coverage.[39]

33. 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 470–71 (1922).

34. Under the Senate bill, an "applicable individual" includes citizens and legal residents who are not incarcerated or who have not been granted a religious exemption. H.R. 3590, 111th Cong. § 1501(b) (as passed by Senate, Dec. 24, 2009).

35. *Id.* Section 1501 of the Senate bill would add a section to the Internal Revenue Code requiring that an "applicable individual . . . ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage." *Id.*

36. *Id.* The penalty would start at $95 per individual in 2014, $350 per individual in 2015, and $750 per individual thereafter. *Id.* The penalty for minors would be one half this amount. *Id.* The bill would cap the total amount of an individual's penalty at 300 percent of the applicable dollar amount. *Id.* President Obama's latest proposal would lower the penalty in 2015 to $325, and in 2016 to $695. President's Proposal, *supra* note 7.

37. H.R. 3590, 111th Cong. § 1501(b) (as passed by Senate, Dec. 24, 2009).

38. *Id.*

39. Professor Michael Dorf explains that today "substantial numbers of healthy, mostly young Americans choose to forego health insurance entirely." The mandate is necessary to address the problem that such individuals would "avoid[] paying premiums when they were healthy, only to collect benefits when they got sick." He

Properly evaluating the individual insurance mandate requires clarifying just what it is. The Senate bill would require that individuals spend their own money to purchase a particular good or service. This kind of mandate has never been enacted into law. In 1994, the Congressional Budget Office examined the individual insurance mandate in legislation introduced during the 103rd Congress and concluded that it 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 . . . . Federal mandates typically apply to people as parties to economic transactions, rather than as members of society."[40]

No one has offered a single example to the contrary.[41] In a memo dated October 29, 1993 to Attorney General Janet Reno, Assistant Attorney General Walter Dellinger defended

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continues, "[t]he solution . . . is the individual mandate: Everyone is required to have health insurance at all times. That way, everyone—including healthy people—pays premiums that end up covering the health care costs of those who ultimately need care." Michael C. Dorf, *The Constitutionality of Health Insurance Reform, Part I: The Misguided Libertarian Objection*, FINDLAW WRIT, Oct. 21, 2009, http://writ.news.findlaw.com/dorf/20091021.html; *see also* Ruth Marcus, *An 'Illegal' Mandate? No*, WASH. POST, Nov. 26, 2009, at A27, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/11/24/AR2009112402815.html (stating that "the individual mandate is central to the larger effort to reform the insurance market").

40. CONG. BUDGET OFFICE, MEMORANDUM: THE BUDGETARY TREATMENT OF AN INDIVIDUAL MANDATE TO BUY HEALTH INSURANCE 1–2 (1994), *available at* http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf [hereinafter CONG. BUDGET OFFICE].

41. *See, e.g.*, Erwin Chemerinksy, *The Constitutionality of Healthcare*, L.A. TIMES, Oct. 6, 2009, http://articles.latimes.com/2009/oct/06/opinion/oe-chemerinsky6 ("The Supreme Court has held that . . . Congress has the ability to regulate activities that have a substantial effect on interstate commerce."); MARK A. HALL, THE CONSTITUTIONALITY OF MANDATES TO PURCHASE HEALTH INSURANCE, O'NEILL INST. FOR NAT'L AND GLOBAL HEALTH LAW 8, *available at* http://www.law.georgetown.edu/oneillinstitute/national-health-law/legal-solutions-in-health-reform/Papers/Individual_Mandates.pdf (stating that "matters relating to insurance substantially affect interstate commerce"). The authors of an excellent analysis published by The Heritage Foundation are correct when they observe: "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." Randy Barnett et al., *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM No. 49 14, Dec. 9, 2009, *available at* http://www.heritage.org/research/legalissues/lm0049.cfm.

the constitutionality of the proposed Health Security Act.[42] He claimed that the United States Supreme Court had upheld "regulation of the economic *choices* [of] individuals,"[43] but offered as support only decisions upholding "the prerogative to regulate the *conduct* of the citizen"[44] or "*activity*" that substantially affects interstate commerce.[45]

Some advocates have tried to find something comparable by describing the individual insurance mandate much more generally. Professor Michael Dorf, for example, describes it as merely imposing "an affirmative obligation on persons."[46] General descriptions can cover more examples than specific ones, and this level of generality allows Professor Dorf to compare the individual insurance mandate with a federal statute requiring that "all citizens . . . shall have an obligation to serve as jurors when summoned for that purpose."[47] He would, in other words, characterize the individual insurance mandate simply as requiring that someone somewhere do something.[48]

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42. Memorandum from Assistant Att'y Gen. Walter Dellinger to Att'y Gen. Janet Reno and Assoc. Att'y Gen. Webster L. Hubbell, Constitutionality of Health Care Reform (Oct. 29, 1993), *available at* http://www.justice.gov/olc/1stlady.htm.

43. *Id.* at 3 (emphasis added).

44. *Id.* at 3–4 (emphasis added) (quoting Nebbia v. New York, 291 U.S. 502, 525 (1934)).

45. *Id.* at 2 (emphasis added) (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)).

46. Dorf, *supra* note 39.

47. 28 U.S.C. § 1861 (2006).

48. Professor Akhil Amar uses a similar tactic: "True, the plan imposes mandates on individuals. So do jury service laws, draft registration laws and automobile insurance laws." Akhil Reed Amar, *Constitutional Objections to Obamacare Don't Hold Up*, L.A. TIMES, Jan. 20, 2010, at 21, *available at* http://articles.latimes.com/2010/jan/20/opinion/la-oe-amar20-2010jan20. In its 1994 analysis, the Congressional Budget Office cited the requirement that draft-age men register with the Selective Service System as the only other example of a mandate that applies to individuals "as members of society." CONG. BUDGET OFFICE, *supra* note 40, at 2. The Supreme Court held nearly a century ago that Congress's authority to require military service comes from its power "To raise and support Armies," "To provide and maintain a Navy," and "To make rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cls. 12–14; *see* Rostker v. Goldberg, 453 U.S. 57, 59 (1981); United States v. O'Brien, 391 U.S. 367, 377 (1968) ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping . . . . The power of Congress to classify and conscript manpower for military service is 'beyond question.'") (citations omitted). As such, Congress has the very enumerated constitutional authority for requiring military service that it lacks for requiring the purchase of health insurance.

The federal statute Professor Dorf cites states that "it is . . . the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose."[49] Many who are considered and summoned for jury service, however, do not actually serve. The website of the United States District Court for the District of South Carolina, for example, states that individuals may be excused from jury service who are over seventy years of age; have served on a federal court jury within the previous two years; care for a child under ten years of age or for aged or infirm persons; whose business or agricultural enterprise would have to close while they served; or who volunteer as firefighters or members of a rescue squad.[50] There are no such exclusions from the individual insurance mandate. In addition, many persons who will be considered for jury service do not eventually serve because they are excused, again for a host of reasons, during the actual jury selection process. The two "mandates" are not at all comparable.[51]

More importantly, the principles discussed earlier counsel for a more specific focus. The limits on government that liberty requires and the necessity for identifying an enumerated power to justify federal legislation cannot be so easily avoided. The federal government's powers, James Madison wrote, are "few and defined" while the states' powers are "numerous and indefinite."[52] This counsels a more concrete, rather than a selectively general, focus when evaluating the constitutionality of federal legislation such as the individual insurance mandate.

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49. 28 U.S.C. § 1861 (2006).

50. Juror Excuses from Service, U.S. Dist. Court, Dist. of S.C., http://www.scd.uscourts.gov/Jury/excuses.asp (last visited Feb. 3, 2010).

51. The Congressional Research Service also examined statutes and regulations that "require a person to take action, and penalize that person for failure to take that action." JENNIFER STAMAN & CYNTHIA BROUGHER, REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS 7 (Cong. Research Serv., CRS Report for Congress Order Code R40725, July 24, 2009), *available at* http://assets.opencrs.com/rpts/R40725_20090724.pdf. The CRS analysis concluded "these cases are not entirely instructive." *Id.*

52. THE FEDERALIST NO. 45, at 82 (James Madison) (J. & A. McLean 1788).

The question, then, is whether the Constitution gives Congress authority to impose a specific kind of requirement, namely, that individuals purchase a particular good or service, not whether it gives Congress the authority to impose any kind of requirement. As the earlier discussion established, a particular enumerated power must provide authority for Congress to enact a particular piece of legislation. Senator Max Baucus (D-MT), who chairs the Finance Committee, has said that Congress's power to regulate interstate commerce[53] and its power to tax and spend[54] form the foundation for the individual insurance mandate.[55] Other analysts and advocates have cited the same two provisions.[56]

In an example of judicial understatement, the Supreme Court recently said that its "understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time."[57] This evolution has steadily expanded "the subject to be regulated," which has been the central element of the clause's meaning since *Gibbons v. Ogden*, the Court's first commerce clause case.[58] In *Gibbons*, the Court said that commerce includes "traffic" and "commercial intercourse" which "concerns more States than

53. U.S. CONST. art. I, § 8, cls. 1, 3 ("The Congress shall have power to . . . regulate commerce . . . among the several states . . . .").

54. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have 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 . . . .").

55. 155 CONG. REC. S13830 (daily ed. Dec. 23, 2009) (statement of Sen. Baucus).

56. *See* SIMON LAZARUS, AM. CONST. SOC'Y ISSUE BRIEF, MANDATORY HEALTH INSURANCE: IS IT CONSTITUTIONAL? 1 (Dec. 2009), http://www.nsclc.org/areas/federal-rights/mandatory-health-insurance-is-it-constitutional/at_download/attachment; Chemerinsky, *supra* note 41; HALL, *supra* note 41, at 1; Marcus, *supra* note 39. Yale law professor Jack Balkin argues that the power to tax alone provides authority for the mandate and that "the Commerce Clause issue is irrelevant." Pershing, *supra* note 29.

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

58. Gibbons v. Ogden, 22 U.S. 1, 189–90 (1824).

one."[59] Congress's power to regulate involves "prescribing rules for carrying on that intercourse."[60]

Since the mid-1930s, the Supreme Court has included as a permissible subject of regulation under the commerce clause not only interstate commerce itself but also an expanding category of activities with some degree of impact on interstate commerce. In *A.L.A. Schechter Poultry Corp. v. United States*, the Court utilized the "necessary and well-established distinction between direct and indirect effects" and held that Congress could regulate activities that directly affect interstate commerce.[61] In *NLRB v. Jones & Laughlin Steel Corp.*, the Court further expanded the subject of regulation under the commerce clause to include activities that "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."[62] In *United States v. Darby*, the Court included as a subject of regulation "activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of . . . the exercise of the granted power of Congress to regulate interstate commerce."[63] In *Wickard v. Filburn*, the

59. *Gibbons*, 22 U.S. at 194; *see also* Veazie & Young v. Moor, 55 U.S. 568, 573–74 (1853) (stating that commerce in its "broadest" meaning includes "not merely traffic, but the means and vehicles by which it is prosecuted" and Congress's power to regulate "was not designed to operate upon matters . . . which are essentially local in their nature and extent"); *see also* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (stating that even local activity may "be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"); County of Mobile v. Kimball, 102 U.S. 691, 702 (1881) ("Commerce . . . consists in intercourse and traffic, including . . . navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.").

60. *Gibbons*, 22 U.S. at 190; *see also* United States v. Lopez, 514 U.S. 549, 553 (1995) (quoting principle stated in *Gibbons*); The Employers' Liability Cases, 207 U.S. 463, 493 (1908) ("It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed."); Lottery Case, 188 U.S. 321, 347 (1903) (stating that regulating commerce "amounts to nothing more than a power to limit and restrain it at pleasure"). For an analysis of the original meaning of the commerce clause, *see* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); 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 (2002).

61. 295 U.S. 495, 546 (1935).

62. 301 U.S. 1, 37 (1937).

63. 312 U.S. 100, 118 (1941).

Court went a step further to include activity that "exerts a substantial economic effect on interstate commerce."[64] In *Lopez*, describing *Wickard* as "the most far reaching example of Commerce Clause authority over intrastate activity,"[65] the Court held that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."[66]

This evolutionary expansion of Congress's power to regulate interstate commerce offers one fact and one caveat that help evaluate the individual insurance mandate today. The fact from these cases is that, whether striking down or upholding an exercise of federal power, they have always involved regulation of activity in which individuals choose to engage. The Court has expanded the category of activities that Congress may regulate by relaxing the required nexus between the activity and commerce but has never abandoned that nexus altogether or crossed the line from regulating activities to requiring them.

In *Carter v. Carter Coal Co.*, for example, the Court struck down the Bituminous Coal Conservation Act, which imposed a tax on the production of coal.[67] In *NLRB*, the Court upheld the National Labor Relations Act, under which the National Labor Relations Board ordered a steel company to re-hire fired workers.[68] In *Darby*, the Court upheld the Fair Labor Standards Act, which a lumber company had been charged with violating.[69] In *United States v. Wrightwood Dairy Co.*, the Court upheld the Agricultural Marketing Agreement Act that authorized the Secretary of Agriculture to set minimum prices for milk produced and sold within one state.[70] In *Wickard*, the Court upheld the Agricultural Adjustment Act, which imposed a tax for growing more than a prescribed amount of wheat.[71] In *Lopez*, the Court struck down the

64. 317 U.S. 111, 125 (1942).

65. *Lopez*, 514 U.S. at 560.

66. *Id.* at 559; *see also* Gonzales v. Raich, 545 U.S. 1, 17 (2005) ("Congress has the power to regulate activities that substantially affect interstate commerce.").

67. 298 U.S. 238 (1936).

68. 301 U.S. 1, 37 (1937).

69. 312 U.S. 100, 124–25 (1941).

70. 315 U.S. 110, 124–26 (1942).

71. 317 U.S. 111, 128–29 (1942).

Gun-Free School Zones Act, which prohibited possession of a firearm within 1000 feet of a school.[72] And in *Gonzales v. Raich*, the Court upheld application of the Controlled Substances Act to prohibit the growing of marijuana that was permissible under state law.[73]

These and all other cases brought under the commerce clause involved attempts by Congress to regulate an activity in which companies or individuals chose to engage. Congress did not require companies to produce coal, re-hire workers, or produce milk. Congress imposed the tax on growing wheat to encourage the purchase of wheat in the national market, but it did not require anyone to do so. There would have been no *United States v. Lopez* if Alfonso Lopez had not chosen to carry a firearm to school. Likewise, there would have been no *Gonzales v. Raich* if Angel Raich had not chosen to grow and use marijuana. The issue before the Supreme Court in each of these cases was whether Congress's power to regulate interstate commerce allowed it to regulate an activity in which companies or individuals had chosen to engage.

Once again, clarity about the nature of the individual insurance mandate is critical to its proper evaluation. If the mandate regulates anything, it regulates decisions rather than activities. This is a constitutionally significant distinction. Regulating what someone has chosen to do includes their freedom of choice in the equation. Regulating someone's decision whether to do something eliminates their freedom of choice. If the principles noted earlier mean anything and if liberty requires that the Constitution impose concrete limits on federal power through adherence to enumerated powers, then this difference between respecting and eliminating individual choice makes all the difference. It is a difference in kind rather than a difference in degree.

The fact from the Supreme Court's commerce clause cases is that they involve activities in which people choose to engage rather than requiring people to engage in those

72. 514 U.S. at 551. Even critics of *Lopez* stay within the limits described here. *See, e.g.*, Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 13–20 (1999) (arguing that the commerce clause allows Congress to regulate all "gainful activity").

73. 545 U.S. 1, 30–32 (2005).

activities. The caveat from the Supreme Court's commerce clause cases is that the Court will reject a version of Congress's power to regulate interstate commerce that would effectively eliminate any limits on federal government power. In *Kidd v. Pearson*, for example, the Court distinguished manufacturing and the buying and selling of manufactured goods.[74] Without this distinction, the Court said, "[C]ongress would be invested . . . with the power to regulate . . . every branch of human industry."[75] In *Schechter Poultry*, the Court said that without its line between activities that directly and indirectly affect interstate commerce, "there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government."[76] In *Jones & Laughlin*, the Court similarly warned that Congress's power "may not be extended so as to . . . effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[77] And in *Lopez*, the Court refused to interpret the commerce clause so broadly that it would be difficult "to posit any activity by an individual that Congress is without power to regulate."[78]

Our system of government requires limits on federal government power, limits that flow from a written Constitution that delegates enumerated powers to Congress. The Constitution could not serve its limiting function if its words had infinitely malleable meaning or if the government could determine the meaning of those words. It is certainly a challenge to determine what the proper standard and application of constitutional provisions such as the commerce clause should be, but it is easier to determine what they should not be. They cannot result in effectively eliminating real limits on government power altogether. This would turn the division of powers between the federal and state governments on its head by making the only condition for the

74. 128 U.S. 1 (1888).
75. *Id.* at 21.
76. 295 U.S. 495, 548 (1935).
77. 301 U.S. 1, 37 (1937).
78. 514 U.S. 549, 564 (1995).

exercise of federal power the lack of a negative prohibition rather than the grant of an affirmative power.

Significantly, the Court's warnings about and its rejection of an unlimited version of the power to regulate interstate commerce came in the context of the cases discussed above, cases that involve activities in which individuals had chosen to engage. Its cases between 1935 and 1942 expanded the category of activities that Congress could regulate from those with a "direct"[79] effect to those with a "substantial"[80] effect on interstate commerce. That is a difference of degree. Even within that context, in *Lopez*[81] and again in *United States v. Morrison*,[82] the Court found that Congress had exceeded its constitutional authority. There are activities in which people choose to engage that Congress cannot regulate in the name of regulating interstate commerce. The individual insurance mandate goes beyond that category altogether and represents the difference between activity and non-activity—between regulating activity and requiring it.

The fact and the caveat from the Supreme Court's commerce clause cases demonstrate that requiring individuals to purchase health insurance is of a different nature altogether from what in the past Congress has ever attempted and the courts have ever approved. For this reason, the Congressional Research Service concluded in July 2009:

> 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.[83]

If there are activities that Congress does not have constitutional authority to regulate under the commerce clause, then

79. *Schechter*, 295 U.S. at 546.

80. Wickard v. Filburn, 317 U.S. 110, 125.

81. 514 U.S. at 551.

82. United States v. Morrison, 529 U.S. 598, 617–18 (2000).

83. STAMAN & BROUGHER, *supra* note 51, at 3.

it is hard to explain how Congress would have authority under the commerce clause after leaving the realm of activities altogether. At a high enough level of generality or by connecting enough conceptual dots, virtually every decision by an individual, including the decision not to engage in a particular activity, has some conceivable impact on the economy or interstate commerce. The decision not to purchase an automobile, not to save for retirement, not to invest in a particular company, or not to engage in interstate commerce can have a negative effect on interstate commerce. By giving Congress the power to require individual activity, that power eliminates the individual's freedom of choice and the distinction between incentives and mandates. There would be virtually nothing that Congress could not do.

The Senate-passed bill contains three categories of "findings" that attempt to connect the individual insurance mandate with the regulation of interstate commerce. The first finding asserts that the mandate itself "is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects" described in the findings.[84] The second category of findings lists the mandate's purported "effects on the national economy and interstate commerce."[85] The third category of findings is a citation to the Supreme Court's decision in *United States v. South-Eastern Underwriters Association*, in which the Court held that "fire insurance transactions which stretch across state lines constitute 'Commerce among the several States.'"[86]

The first category makes three errors. It mistakenly focuses on the regulation, rather than the subject of regulation, as that which must affect interstate commerce. The Supreme Court's cases have not evaluated whether a statute substantially affects interstate commerce but whether the activity regulated by the statute does so. The findings also improperly include "economic and financial *decisions*" within the category of "activity that is commercial and economic in na-

84. H.R. 3590, 111th Cong. § 1501(a)(1) (as passed by Senate, Dec. 24, 2009).
85. *Id.* § 1501(a)(2).
86. 322 U.S. 533, 538, 562 (1944).

ture."[87] As discussed above, the Supreme Court has never gone beyond the category of activities in which people have chosen to engage to include the decision whether to engage in that activity. And in addition to improperly equating decisions with activities, this first category of findings misidentifies the decision in question. The mandate concerns the decision to purchase health insurance, not "decisions about how and when health care is paid for."[88] Under this legislation, individuals will be required to purchase health insurance whether they ever obtain health care services.

The second category of findings similarly has the wrong focus. "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."[89] Needless to say, if Congress believes such a conclusion would make legislation more likely to become law or more likely to be upheld in the courts, Congress is more likely to at least state that conclusion. The essential inquiry, however, is about the constitutional authority for, not the economic effects of, a legislative provision. And while the findings assert that uninsured individuals who seek medical care impose an economic cost on everyone else, the individual insurance mandate is not limited to those who seek medical care. It requires individuals to obtain a minimum level of health insurance coverage whether they ever see a doctor, ever buy a prescription, or ever undergo a medical test or surgical procedure.

Finally, merely stating the holding in *South-Eastern Underwriters* shows its irrelevance to the individual insurance mandate.[90] This case involved commercial activities such as

87. H.R. 3590, 111th Cong. § 1501(a)(2)(A) (as passed by Senate, Dec. 24, 2009) (emphasis added).

88. *Id.*

89. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring).

90. In his paper published by the American Constitution Society, Simon Lazarus relies heavily on the *South-Eastern Underwriters* decision. LAZARUS, *supra* note 56, at 4–5; *see also* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). He also argues that since "health insurance is itself an 'ingredient' of interstate commerce," Congress may do anything that will make health insurance coverage "broader[], more efficient and less costly, or otherwise improve[ed]." LAZARUS, *supra* note 56, at 6. Not surprisingly, he offers no support for that broad proposition. *See id.* It would extend the reach of Congress's power to regulate

the "execution of insurance contracts" and "innumerable transactions necessary to performance of the contracts."[91] These are activities in which people choose to engage. The constitutionality of the individual insurance mandate, however, depends upon whether Congress may require that individuals engage in such transactions and require that individuals participate in executing such insurance contracts. The individual insurance mandate does not regulate the sale of health insurance or the provision of healthcare services. It mandates the purchase of health insurance.

Congress has certainly sought to influence individuals' spending decisions. So-called "sin" taxes, such as the excise tax on cigarettes, seek to discourage purchase of certain products. Tax deductions encourage contributions to charitable or educational organizations. The recent "Cash for Clunkers" program used a tax credit to encourage the purchase of new, fuel-efficient cars. But none of these is a mandate that requires individuals to spend their own money to purchase a particular good or service. That is what the individual insurance mandate does, and it remains unprecedented and unjustified by Congress's power to regulate interstate commerce.

2. *Individual Insurance Mandate Enforcement Penalty*

Under the bill passed by the Senate, failure to obtain the specific level of health insurance coverage would result in a "penalty" to be collected through the Internal Revenue Code.[92] Advocates collapse the mandate into the penalty that

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interstate commerce, and the category of permissible subject of that regulation, far beyond anything that the Supreme Court has approved.

91. *South-Eastern Underwriters*, 322 U.S. at 537.

92. Under the Senate bill, a penalty imposed for failure to obtain health insurance would "be included with a taxpayer's return" by being added to the tax owed for that taxable year. H.R. 3590, 111th Cong. § 1501(b) (as passed by Senate, Dec. 24, 2009). Failure to pay the additional tax represented by this penalty would not result in "any criminal prosecution or penalty" or any lien or levy on a taxpayer's property. *Id.* Under federal law, however, failing to pay taxes can result in a range of civil and criminal penalties. 26 U.S.C. §§ 6662–63, 6651, 6702, 7201, 7203. It is unclear how the Internal Revenue Service will distinguish between the failure to pay taxes that are owed because of the penalty and taxes that would otherwise be owed. It is similarly unclear how the enforcement penalty would be applied and collected in the case of individuals who do not file an income tax return. This number was more than 18 million Americans in 2003. PETER R. ORSZAG & MATTEW G. HALL, TAX POL'Y

enforces it and, by characterizing the penalty as a tax, argue that Congress's authority to tax and spend authorizes the package. This argument can potentially succeed only by accepting that the enforcement penalty is a tax. On September 20, 2009, President Obama was interviewed by ABC News's George Stephanopoulos, who asked: "Under this mandate, the government is forcing people to spend money, fining you if you don't. How is that not a tax?" President Obama responded: "No. That's not true." The host asked again: "But you reject that it's a tax increase?" President Obama was unequivocal: "I absolutely reject that notion."[93]

The Congressional Research Service examined this provision in the Senate bill and distinguished between taxes and penalties. While true taxes fall under Congress's broad authority to tax, penalties require that Congress separately have constitutional authority to impose the underlying requirement. The Congressional Research Service concluded:

> But where a tax is imposed conditionally, and may be avoided by compliance with regulations set out in the statute, its character may also be accurately described as a penalty. In these cases, the Supreme Court has asked whether Congress has the authority to regulate the underlying subject matter. If such regulation is authorized under a provision of the Constitution other than the Taxing power, the exaction has been sustained as an

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CENTER, NONFILERS AND FILERS WITH MODEST TAX LIABILITIES 723 (Aug. 4, 2003), http://www.urban.org/UploadedPDF/1000548_TaxFacts_080403.pdf; *see also* Michael Tanner, *Individual Mandates for Health Insurance: Slippery Slope to National Health Care*, POL'Y ANALYSIS, Apr. 5, 2006, at 3, *available at* http://www.cato.org/pubs/pas/pa565.pdf. "Another 9 million Americans who are required to file tax returns nonetheless fail to do so." *Id.*

93. Interview by George Stephanopoulos with Barack Obama, President of the United States of America (Sept. 20, 2009), *available at* http://blogs.abcnews.com/george/2009/09/obama-mandate-is-not-a-tax.html. Stephanopoulos also noted that President Obama had opposed the individual insurance mandate during the presidential campaign. *Id.* During the debate between then-Senators Hillary Clinton and Barack Obama on January 31, 2008, CNN's Wolf Blitzer asked about "the most significant policy differences between the two of you." Obama highlighted as a "genuine difference" the fact that "Senator Clinton has a different approach. She believes that we have to force people who don't have health insurance to buy it." Hillary Clinton and Barack Obama, 2008 Democratic Presidential Debate (Jan. 31, 2008) (transcript available at http://www.cnn.com/2008/POLITICS/01/31/dem.debate.transcript/).

> appropriate enforcement mechanism. Absent such authority, such taxes have been found to be invalid.[94]

The penalty enforcing the individual insurance mandate fits squarely within this analysis. It "appears to have a purpose besides the traditional revenue raising purpose of taxation since it is effectively the enforcement mechanism for the insurance coverage mandate."[95] In other words, if it works as intended, the penalty would not generate any revenue at all. It is, in operation, what it is called in the Senate bill, namely, a penalty for failure to obtain health insurance.[96] As such, its legitimacy depends upon whether Congress has separate constitutional authority to impose the mandate that the penalty enforces.[97] As analyzed earlier, that authority can come only from Congress's authority to regulate interstate commerce and that authority does not include requiring individuals to purchase a particular good or service.

Even if the enforcement penalty is considered a tax, it runs afoul of a different constitutional requirement. Article I imposes specific requirements on direct and indirect taxes. "Congress . . . must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity."[98] Direct taxes are imposed upon "the owner [of property] merely because he is owner, regardless of his use or disposition of the property."[99] Examples include taxes on real or personal property or a capitation tax,[100] which is "a tax of a

94. EDWARD C. LIU ET AL., CONSTITUTIONALITY OF PROVISIONS OF THE CHAIRMAN'S MARK OF THE AMERICA'S HEALTHY FUTURE ACT OF 2008, AS AMENDED ON OCTOBER 2, 2009 8 (Cong. Research Serv., Memorandum, Oct. 9, 2009), at 8 (citations omitted).

95. *Id.* at 21.

96. The Senate calls this enforcement mechanism a penalty in at least a dozen places. H.R. 3590, 111th Cong. § 1501 (as passed by the Senate, Dec. 24, 2009). President Obama's latest proposal does not change the nature or function of this penalty, and the media continue to call it a "fine." MacGillis & Goldstein, *supra* note 7.

97. *See also* David B. Rivkin & Lee A. Casey, *Illegal Health Reform*, WASH. POST, Aug. 22, 2009, at A15, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/08/21/AR2009082103033.html. "Congress cannot use its power to tax solely as a means of controlling conduct that it could not otherwise reach through the commerce clause or any other constitutional provision." *Id.*

98. License Tax Cases, 72 U.S. 462, 471 (1867).

99. Fernandez v. Wiener, 326 U.S. 340, 362 (1945).

100. Murphy v. I.R.S., 493 F.3d 170, 181 (D.C. Cir. 2007).

specific sum levied upon each person within the jurisdiction of the taxing power and within a certain class . . . without reference to his property or lack of it."[101] Under Article I, Section 9, "[N]o capitation, or other direct, Tax shall be laid, unless in Proportion to the Census."[102] This apportionment rule requires that "a state with twice the population of another state would have to pay twice the tax."[103]

Indirect taxes, by contrast, are often called excise taxes and are imposed upon the production or sale of goods and services,[104] the transfer of gifts or estates, or "a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property."[105] Excise taxes are akin to event taxes.[106] Under Article I, Section 8, "all Duties, Imposts and Excises shall be uniform throughout the United States."[107]

The penalty for failing to purchase health insurance is clearly not an excise tax. It is imposed not at the occurrence, but in the absence, of a transaction or sale. This penalty is instead a lump sum imposed directly on the individuals who fail to comply with the mandate.[108] Tax law expert George Clarke analyzed the penalty and concluded: "A tax on a person who chooses not to act is precariously close to a tax on everyone with an exemption from the tax for those that act."[109] If the enforcement penalty is a tax at all, then it is

101. BLACK'S LAW DICTIONARY 1498 (8th ed. 2004).

102. U.S. CONST. art. I, § 9, cl. 4.

103. Erik M. Jensen, *Direct Taxes*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 159, 159 (Edwin Meese III et al. eds., 2005).

104. *Murphy*, 493 F.3d at 181.

105. Fernandez v. Wiener, 326 U.S. 340, 352 (1945).

106. *See generally* IRS.gov, Excise Tax, http://www.irs.gov/businesses/small/article/0,,id=99517,00.html (last visited Mar. 15, 2010).

107. U.S. CONST. art. I, § 8, cl. 1.

108. *See* Erik M. Jensen, *The Apportionment of 'Direct Taxes': Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2390 (1997) (stating that "there can be no doubt . . . that a capitation tax is direct" and that it includes "a lump-sum charge on each taxed person"); Robert A. Levy & Michael F. Cannon, *Bill 'reforms' Constitution*, PHILA. INQUIRER, Dec. 11, 2009, http://www.philly.com/inquirer/opinion/79034917.html (stating that the penalty is "levied per person and [is] therefore a 'direct tax' under the Constitution, which requires that such taxes be apportioned among the states according to their population, as determined by the census").

109. George Clarke, *Baucus 'Excise' on Those Who Fail to Buy Insurance Raises Constitutional Issue*, BNA DAILY REP. FOR EXECUTIVES, Sept. 29, 2009.

much more like a direct tax than an excise tax. Even the Senate bill's reference to the enforcement mechanism calls it a "penalty with respect to the individual."[110] The penalty enforcing the individual insurance mandate, if a tax at all, is a direct tax on individuals and, therefore, fails to comply with the apportionment requirement of Article I, Section 9.

3. Excise Tax on High-Cost Insurance Plans

The Senate bill would impose, starting in 2013, an "excise tax on high cost employer-sponsored health coverage."[111] The insurance provider must pay a "tax equal to 40 percent of the excess benefit," defined as an annual premium of more than $8,500 for "an employee with self-only coverage" or $23,000 for "an employee with coverage other than self-only coverage."[112] This tax on so-called "Cadillac" health insurance plans has become controversial and labor union members whose collective bargaining agreements include such plans have lobbied the White House and congressional leaders to modify this provision of the legislation.[113]

For present purposes, however, the portion of this provision that raises constitutional questions is the "transition rule for states with highest coverage costs."[114] This provision would, for three years, raise the "excess benefit" threshold that triggers this excise tax in "each of the 17 States which the Secretary of Health and Human Services, in consultation with the Secretary [of the Treasury], estimates had the highest average cost during 2012 for employer-sponsored coverage under health plans."[115] As a result, sale of identical insurance policies charging identical premiums would be taxed in some states but not in others. The constitutional question is

110. H.R. 3590, 111th Cong. § 1501(b)(1) (as passed by Senate, Dec. 24, 2009).

111. *Id.* § 9001.

112. *Id.*

113. *See* Lori Montgomery & Michael D. Shear, *White House Nears Deal on Health Care*, WASH. POST, Jan. 15, 2010, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/01/14/AR2010011404837.html. The President's Proposal raises the threshold triggering the excise tax and delays its implementation until 2018. MacGillis & Goldstein, *supra* note 7.

114. H.R. 3590, 111th Cong. § 9001 (as passed by Senate, Dec. 24, 2009).

115. *Id.*

whether this differential application of the excise tax is nonetheless "uniform throughout the United States."[116]

This tax on the sale of certain insurance plans is clearly an excise tax. The kind of goods, activities, and transactions that are the subject of excise taxes "are distributed unequally through the country" so that "virtually all such taxes have non-uniform effects."[117] Professor Nelson Lund explains that the "challenge in interpreting the Uniformity Clause is to distinguish between the kind of non-uniformity that is forbidden by the Constitution and the inevitable non-uniform effects that accompany legitimate duties, imposts, and excises."[118] Neither the framers of the Constitution nor the Supreme Court have provided much guidance on this question. In *Edye v. Robertson*, the Court stated that a tax is uniform if it "operates with the same force and effect in every place where the subject of it is found."[119] And in *United States v. Ptasynski*, the Court said that "where Congress does choose to frame a tax in geographic terms, we will examine the classification closely to see if there is actual geographic discrimination."[120] Congress has wide latitude in determining what to tax and may tailor a regional solution to a geographically isolated problem, but laws drawn explicitly in terms of state lines will receive heightened scrutiny.[121]

The Congressional Research Service examined this provision of the Senate bill and concluded that "the legislative history of the provision is incomplete, and it does not appear that Congress has yet fully articulated its justification for creating the special rule for the 17 highest cost states."[122]

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116. U.S. CONST. art. I, § 8.

117. Nelson Lund, Comment, *The Uniformity Clause*, 51 U. CHI. L. REV. 1193, 1194–95 (1984).

118. Nelson Lund, *Uniformity Clause*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION, *supra* note 103, at 97. For a thorough analysis of the uniformity clause, *see* Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249 (2005).

119. 112 U.S. 580, 594 (1884).

120. 462 U.S. 74, 85 (1983).

121. *See* Jensen, *supra* note 108, at 2340. ("The uniformity rule has been held to require only geographical uniformity: the standards that apply in one state must apply in all other states as well. For example, Congress may not tax a particular transaction in New York at a ten percent rate and an otherwise identical transaction in Delaware at a fifteen percent rate.").

122. EDWARD C. LIU ET AL., *supra* note 94, at 27.

Because the classification is framed explicitly along state lines, courts must "examine the classification closely to see if there is actual geographic discrimination."[123] On the current record, there is very little available for that examination. Research has not uncovered anything explaining the choice of seventeen states, as opposed to ten or twenty or any other number, for this category of "highest average cost" states. In fact, the Senate bill does not even identify those states but leaves their choice to the Secretaries of Health and Human Services and the Treasury.[124]

These are some of the constitutional issues that affect individuals and businesses arising from provisions of the health insurance reform bill passed by the Senate on December 24, 2009.[125] Congress's authority to regulate interstate commerce does not extend to requiring that individuals purchase a particular good or service such as health insurance. The mechanism enforcing this individual insurance mandate is properly seen as a penalty rather than a tax and, therefore, is unconstitutional because Congress lacks authority for the underlying mandate. If the penalty is instead considered a tax, it is properly seen as a direct tax and, therefore, is unconstitutional because it is not apportioned. Finally, the excise tax on high cost health insurance plans is unconstitutional because, since it applies differently in some states than in others, it is not uniform throughout the United States.

B. Constitutional Issues Affecting States

Philosopher George Santayana wrote that "those who cannot remember the past are condemned to repeat it."[126] That

123. *Ptasynski*, 462 U.S. at 85.

124. H.R. 3590, 111th Cong. § 9001 (as passed by Senate, Dec. 24, 2009).

125. Professor Richard Epstein argues that the bill's restrictions on the ability of insurance companies to make their own risk-adjusted decisions about coverage and premiums amount to a regulatory taking in violation of the Fifth Amendment. Richard A. Epstein, *Impermissible Ratemaking in Health-Insurance Reform: Why the Reid Bill is Unconstitutional*, MANHATTAN INST. CTR. FOR LEGAL POL'Y, Dec. 18, 2009, *available at* http://www.medicalprogresstoday.com/pdfs/MI_Health_Care_act.pdf. For other constitutional concerns affecting individuals, see Peter Urbanowicz & Dennis G. Smith, *Constitutional Implications of an 'Individual Mandate' in Health Care Reform*, FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUD., July 10, 2009, *available at* http://www.fed-soc.org/doclib/20090710_Individual_Mandates.pdf.

126. GEORGE SANTAYANA, THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS 82 (1954).

advice would serve Congress well in developing health insurance reform legislation. Frances Perkins served as Secretary of Labor during the entire presidency of Franklin D. Roosevelt.[127] In an October 1962 speech about the history of the Social Security system,[128] she told of discussing legislative initiatives with Roosevelt including "old-age insurance, and health insurance."[129] Roosevelt himself doubted whether the federal government could achieve such objectives because, as he and Perkins agreed, there were "very severe constitutional problems."[130] These problems included interference with "state-federal relationships."[131] In fact, they "took it for granted that anything in the way of social legislation had to be done state by state."[132] Rather than "rig up any curious constitutional relationships,"[133] the Roosevelt administration and Congress established the Social Security system squarely on the taxing power through direct imposition of a payroll tax.[134]

As the review of the Supreme Court's commerce clause cases revealed, the Roosevelt administration coincided with the most significant expansion of federal power in American history. Even at that time, however, when leaders sought to assert a stronger federal role in the economy and society, they agreed that Congress could not achieve social legislative goals such as health insurance through federal mandates and regulations. It appears, then, that even President Roosevelt would believe that the individual insurance mandate exceeds Congress's power to impose. In addition, the Senate health insurance reform bill seeks to establish and use the very "curious constitutional relationships" that change the balance

127. SocialSecurity.gov, Social Security Pioneers: Frances Perkins, http://www.socialsecurity.gov/history/fperkins.html (last visited Feb. 6, 2010) (reciting the biography of the first female to be appointed to a Cabinet position).

128. Frances Perkins, Address at the Social Security Administration Headquarters (Oct. 23, 1962) (transcript available at http://www.socialsecurity.gov/history/perkins5.html).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

between the federal and state governments that President Roosevelt avoided.

1. Commandeering States to Implement a Federal Program

The Senate bill would require each state to "establish an American Health Benefit Exchange" by January 1, 2014.[135] "An Exchange shall be a governmental agency or nonprofit entity that is established by a State" and must meet an extensive list of criteria established by the Secretary of Health and Human Services.[136] States must establish and operate these exchanges without federal funds[137] but if the Secretary of Health and Human Services determines that a state has not met this requirement, she "shall . . . establish and operate such Exchange within the State and the Secretary shall take such actions as are necessary to implement such other requirements."[138]

"The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States."[139] Justice Sandra Day O'Connor was writing here for the Supreme Court in a case about Congress's mandate that states take title to and possession of nuclear waste generated within their borders and be liable for damages for failure to do so. The case "concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way."[140] The Court held that while the scope of federal authority has changed over time, "the constitutional structure underlying and limiting that authority has not."[141] This means that while Congress may induce states to take certain actions by conditioning federal funds upon their compliance,[142] Congress may not "cross[ ] the line distinguishing encouragement

135. H.R. 3590, 111th Cong. § 1311(b) (as passed by Senate, Dec. 24, 2009).
136. *Id.* § 1311(d)(1).
137. *Id.* § 1311(d)(5).
138. *Id.* § 1321(c)(1).
139. New York v. United States, 505 U.S. 144, 149 (1992).
140. *Id.* at 161.
141. *Id.* at 159.
142. *Id.* at 167.

from coercion."[143] Congress may not "'commandeer[ ] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[144]

Several years later, the Supreme Court reviewed a provision of the Brady Handgun Violence Prevention Act which required local law enforcement officials to conduct a background check when an individual had purchased a firearm. Reaffirming the principle that "state legislatures are *not* subject to federal direction,"[145] the Court held that Congress may regulate individuals, but not states,[146] and concluded that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[147] As if this were not clear enough, the Court said: "We . . . conclude categorically, as we concluded categorically in *New York [v. United States]*: 'The Federal Government may not compel the States to enact or administer a federal regulatory program.'"[148]

The Senate bill euphemistically calls this threat of federal intervention "state flexibility in operation and enforcement of exchanges and related requirements."[149] It is important to note that this is not a threat to pre-empt the state exchanges by the establishment of a national exchange created by Congress. Under the Senate bill, the exchanges will remain state entities, established and operated with state funds, but may be established and operated by the Secretary of Health and Human Services.

This seems even more in the nature of actively commandeering the states than a simple directive that state officials take certain actions to implement a federal program. This arrangement would require states to pass state legislation and issue state regulations, and may well see their state operations taken over and directed by a federal official. Congress

143. *Id.* at 175.

144. *Id.* at 176 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)).

145. Printz v. United States, 521 U.S. 898, 912 (1997) (emphasis in original).

146. *Id.* at 920 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).

147. *Id.* at 925.

148. *Id.* at 933 (quoting *New York*, 505 U.S. at 188.)

149. H.R. 3590, 111th Cong. § 1321 (as passed by Senate, Dec. 24, 2009).

would require, rather than encourage,[150] states to pass their own legislation to implement this federal health insurance program. In describing this provision on the Senate floor, Finance Committee Chairman Baucus said that it "gives States the choice to participate in the exchanges themselves or, if they do not choose to do so, to *allow* the Federal Government to set up the exchanges."[151]

America's founders implemented the principle that liberty requires limits on government power in various ways, including the separation of powers into branches and the division between spheres of federal and state power.[152] This structural framework cannot be compromised without the liberty it protects being compromised. One of the most common arguments for doing so is that the particular crisis of the moment requires it, which is to say that the ends justify the means. But that is the difference between principles and politics and between constitutional imperatives and policy objectives. As Justice O'Connor wrote: "But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[153]

There exists an important parallel between the individual and state mandates in the Senate bill. In both cases, Congress could have pursued its policy objective through incentives but chose to impose mandates. The result is an

150. In *South Dakota v. Dole*, the Supreme Court held that even if Congress could not directly impose a national minimum age for alcohol consumption, encouraging the states to establish that policy by threatening to withhold federal highway funds would be a valid exercise of Congress's spending power. 483 U.S. 203 (1987).

151. 155 CONG. REC. S13832 (daily ed. Dec. 23, 2009) (statement of Sen. Baucus) (emphasis added).

152. *See* Gregory v. Ashcroft, 501 U.S. 452, 458–59 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power. 'The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties."' . . . Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." (citations omitted)).

153. *New York*, 505 U.S. at 187.

expansion of federal government power beyond what the Constitution authorizes. "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people."[154] The people have not given Congress power to require that individuals purchase particular goods or services or the power to compel the states to implement and administer a federal regulatory program.

2. *Relief from Medicaid Costs for Nebraska*

Another provision of the Senate bill raising constitutional issues affecting states would exempt Nebraska for its share of the increased cost of the Medicaid program created by the bill.[155] The news media have reported that this provision was added so that Senator Ben Nelson (D-NE) would support the bill.[156] As controversy about this provision has grown, there has been increased pressure to either eliminate it altogether or to give the same exemption to all states, and it has been reported that Senator Nelson himself supports such elimination or modification.[157]

The constitutional concern over this special treatment of one state was expressed in letters sent to congressional leaders. In one letter dated December 30, 2009, a group of thirteen state attorneys general argued that "this provision is constitutionally flawed. As chief legal officers of our states we are contemplating a legal challenge to this provision and we ask you to take action to render this challenge unneces-

154. United States v. Butler, 297 U.S. 1, 63 (1936).

155. H.R. 3590, 111th Cong. § 10201 (as passed by Senate, Dec. 24, 2009).

156. *See* Amy Goldstein, *Medicaid Provision for Nebraska Raises Ire*, WASH. POST, Jan. 17, 2010, http://www.washingtonpost.com/wp-dyn/content/article/201001/16/AR2010011602884.html.

157. *See* Lori Montgomery, *Democrats Seek Quick Deal on Health-Care Bill*, WASH. POST, Jan. 16, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/01/15/AR2010011504061.html. Under President Obama's recent proposal, the legislation would eliminate the assistance targeted at Nebraska and provide "significant additional Federal financing to all States for the expansion of Medicaid." President's Proposal, *supra* note 7. Even though this single-state benefit may be eliminated, it is troubling that it was considered at all. The Constitution before the fact, rather than political backlash or negative publicity after the fact, should have prevented that consideration.

sary by striking that provision."[158] They argued this separate treatment for Nebraska would be inconsistent with the constitutional requirement that congressional spending "provide for the . . . general welfare of the United States."[159] Giving one state relief from its share of increased Medicaid program costs, they said, would "be not only unrelated, but also antithetical to the legitimate federal interests in the bill."[160]

In a separate letter to Senators Kay Bailey Hutchison (R-TX) and John Cornyn (R-TX), Texas Attorney General Greg Abbott, who had also signed the group letter, explained this argument further and offered others.[161] He cited the Supreme Court decision in *Ptasynski*,[162] discussed above in connection with the differential taxation of high cost insurance plans, for the proposition that Congress may treat some states differently than others only when addressing "geographically isolated problems."[163] Spreading the cost of the Medicaid program is a national objective which selective state exemptions makes more difficult.[164]

CONCLUSION

Liberty requires limits on government power. Those limits come primarily from a written Constitution which delegates enumerated powers to Congress. There must be at least one of those enumerated powers to justify legislation and those powers do not mean whatever Congress wants them to mean.

158. Letter from Thirteen State Att'ys Gen. to the Hon. Nancy Pelosi and the Hon. Harry Reid (Dec. 30, 2009), *available at* http://www.scattorneygeneral.org/newsroom/pdf/2009/healthCareLetter.pdf.

159. U.S. CONST. art. I, § 8, cl. 1.

160. Letter from Thirteen State Att'ys Gen., *supra* note 158.

161. Letter from Greg Abbott, Att'y Gen. of Tex. to the Hon. Kay Bailey Hutchison and the Hon. John Cornyn (Jan. 5, 2010), *available at* http://www.oag.state.tx.us/newspubs/releases/2010/010610healthcare.pdf.

162. 462 U.S. 74 (1983).

163. *Id.* at 84; Letter from Greg Abbott, *supra* note 161.

164. Attorney General Abbott also argued that the individual insurance mandate is unconstitutional: "For the first time Congress is attempting to regulate and tax Americans for doing absolutely nothing. H.R. 3590 attempts to tax and regulate each American's mere existence. This unprecedented congressional mandate threatens individual liberty and raises serious constitutional questions." Letter from Greg Abbott, *supra* note 161.

Members of Congress have their own, independent responsibility to ensure that proposed legislation is consistent with the Constitution. Fulfilling this responsibility requires more than a self-serving assumption that the Constitution necessarily allows whatever they want to do or general speculation about how the courts might answer the question.

Instead, fulfilling this responsibility requires clarity about the purported exercise of federal power and analysis at a level concrete enough to allow meaningful application of these principles. This application leads this author to conclude that Congress does not have authority to require that individuals purchase health insurance or to enforce that mandate with a financial penalty. In addition, Congress may neither use as its mandate enforcement mechanism a penalty that amounts to an unapportioned direct tax nor apply an excise tax on high cost insurance plans differently in some states than in others. Commandeering states to implement this federal regulatory program or selectively giving financial advantages to some states but not others similarly violates the Constitution. These are only some of the constitutional concerns raised by the Senate health insurance reform bill.[165]

Senator Moynihan said that the Senators' oath is to the Constitution, not to political objectives. This author agrees with the authors of the Heritage Foundation's analysis of the individual insurance mandate, that "political considerations aside, each legislator owes a duty to uphold the Constitution."[166]

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165. In a letter dated December 11, 2009, the United States Commission on Civil Rights wrote to congressional leaders expressing "deep reservations about racially discriminatory provisions included in" the Senate health insurance reform bill. Letter from U.S. Comm. on Civil Rights to President Barack Obama and Eight United States Senators (Dec. 11, 2010), *available at* http://www.usccr.gov/correspd/LetterPresidentSenatorsHealthCare12-11-09.pdf. These reservations include authorizing the Secretary of Health and Human Services to enter into contracts and award grants to entities operating professional training programs for health care professionals with a "demonstrated record" of training individuals from certain minority groups. *Id.* These provisions are constitutionally suspect, the Commission argued, to the extent that these entities use racially preferential admissions policies. *Id.* For other arguments that the health insurance reform legislation raises constitutional problems, see David B. Rivkin, Jr. & Lee A. Casey, *Is Government Health Care Constitutional?*, WALL ST. J., June 22, 2009, http://online.wsj.com/article/SB124562948992235831.html (focusing on the "right to privacy").

166. Barnett et al., *supra* note 41, at 16.