

## Scholarly Commons @ UNLV Boyd Law

---

Scholarly Works

Faculty Scholarship

---

2011

### Constitutional Challenges to the Health Care Mandate: Based in Politics, Not Law

David Orentlicher

*University of Nevada, Las Vegas – William S. Boyd School of Law*

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Health Law and Policy Commons](#), [Law and Politics Commons](#), [Medical Jurisprudence Commons](#), and the [Taxation-Federal Commons](#)

---

#### Recommended Citation

Orentlicher, David, "Constitutional Challenges to the Health Care Mandate: Based in Politics, Not Law" (2011). *Scholarly Works*. 1056.

<https://scholars.law.unlv.edu/facpub/1056>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact [youngwoo.ban@unlv.edu](mailto:youngwoo.ban@unlv.edu).

---

## RESPONSE

---

---

### CONSTITUTIONAL CHALLENGES TO THE HEALTH CARE MANDATE: BASED IN POLITICS, NOT LAW

---

DAVID ORENTLICHER<sup>†</sup>

In response to Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825 (2011).

While critics of the individual mandate to purchase health care coverage have mounted a vigorous attack on its constitutionality, Professor Mark Hall skillfully dismantles their claims.<sup>1</sup> Mandate opponents have erected a Potemkin village of logic that has a facade of credibility but ultimately is deeply flawed. As Professor Hall observes, one might reject the mandate on the basis of plausible readings of the constitutional text or in terms of nineteenth-century and early twentieth-century Supreme Court opinions. However, critics cannot square their view with the Court's understanding of constitutional doctrine and theory over the past seventy years.<sup>2</sup>

---

<sup>†</sup> Samuel R. Rosen Professor and Co-Director of the Hall Center for Law and Health, Indiana University School of Law—Indianapolis; M.D., Harvard Medical School; J.D., Harvard Law School.

<sup>1</sup> Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825 (2011).

<sup>2</sup> To be sure, individual members of the Supreme Court may share the perspective of mandate critics. Justice Clarence Thomas, for example, would like to resurrect Commerce Clause doctrine that was abandoned seventy years ago. *See* *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (proposing that the Court “ought to temper [its] Commerce Clause jurisprudence”). Indeed, there are minority viewpoints on most of the Court's constitutional positions. However, I agree with Professor Hall's view that prevailing interpretations of the Constitution readily justify the individual mandate.

In this Response, I will highlight important points in Professor Hall's analysis and extend his argument with additional considerations. For example, the individual mandate should be upheld not only on the basis of the Commerce Clause power, as Professor Hall argues, but also on the basis of the taxing power.

If the constitutional arguments against the mandate are weak, then how can we explain the unexpectedly high level of uncertainty about the mandate's validity? The answer to this question lies in politics, not law.

## I. THE HIGHLIGHTS FROM PROFESSOR HALL'S ANALYSIS

### A. *Context Matters*

In their arguments against the individual mandate, critics neglect the fact that context matters in constitutional analysis. As Professor Hall points out, opponents challenge the mandate as if it were a free-standing provision rather than a key element of a broad regulatory overhaul of the health care system.<sup>3</sup> Yes, it would be troublesome if Congress had passed a one-section law that made it a crime not to purchase health care insurance. But that is not what happened. Rather, Congress passed a more than 2400-page statute with hundreds of provisions designed to reduce the number of uninsured Americans, to lower the cost of medical treatment, and to improve the quality of care.<sup>4</sup> In one important part of its effort to make insurance more affordable, the Patient Protection and Affordable Care Act (PPACA) forbids insurers from charging people higher premiums or denying coverage on the basis of their cancer, heart disease, or other "preexisting medical conditions."<sup>5</sup> And as Congress recognized, this ban on health status discrimination can work only if people are required to

---

<sup>3</sup> See Hall, *supra* note 1, at 1829-30 (comparing this argument to criticism of federal drug laws prior to the Court's decision in *Gonzalez v. Raich*, 545 U.S. 1 (2005), in which "challengers sought 'to excise individual applications of a concededly valid statutory scheme'" (quoting *Raich*, 545 U.S. at 22)).

<sup>4</sup> Different printings of the bill take up different numbers of pages. For the 2409-page version, see H.R. 3590, 111th Cong. (as passed by the House, Dec. 24, 2009), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr3590pp/pdf/BILLS-111hr3590pp.pdf>. Although 2400 is the number commonly used to refer to the law's page length, a later version of the bill was only 955 pages. See OFFICE OF THE LEGISLATIVE COUNSEL, COMPILATION OF PATIENT PROTECTION AND AFFORDABLE CARE ACT (2010), available at <http://docs.house.gov/energycommerce/ppacacon.pdf>.

<sup>5</sup> In this way, the law supplements the civil rights statutes that ban discrimination by insurers on the basis of race or sex. Starting in 2014, insurers may no longer discriminate on the basis of health status. PPACA § 1201, 42 U.S.C.A. § 300gg-4 (West Supp. 1A 2010).

buy insurance. Otherwise, people could game the system by waiting until they become sick before purchasing coverage.<sup>6</sup> The connection between the antidiscrimination provision and the individual mandate is critical for constitutional purposes. The Supreme Court has long recognized that when Congress enacts a broad regulatory statute, it may include provisions essential to the implementation of the statute even though the provisions might not be acceptable when standing alone.<sup>7</sup> Thus, Congress can prohibit the backyard cultivation of marijuana for personal medicinal use as part of its broad effort to eliminate the distribution of marijuana for recreational drug use.<sup>8</sup> Similarly, Congress can require the purchase of insurance as part of its broad effort to make health care coverage affordable.<sup>9</sup>

The commonly used broccoli hypothetical illustrates nicely the distinction between a stand-alone provision and a provision that supports a broader legislative objective. Critics of the individual mandate argue that if Congress can require people to buy insurance to benefit their health, then it also can require people to buy—or even to eat—broccoli to benefit their health.<sup>10</sup> The critics are correct that a simple mandate to buy or eat broccoli would be unconstitutional. However, suppose that the United States faced an outbreak of a new influenza

---

<sup>6</sup> State efforts to ban preexisting-conditions clauses without a mandate to purchase insurance have not worked. See Mark A. Hall, *The Factual Bases for Constitutional Challenges to Federal Health Insurance Reform*, 38 N. KY. L. REV. (forthcoming 2011) (manuscript at 11-22), available at <http://ssrn.com/abstract=1717781> (“Previously, when states tried to eliminate medical underwriting without an insurance mandate, as Kentucky did in 1994, these markets suffered, shrank, and almost collapsed.” (footnote omitted)).

<sup>7</sup> See *Thomas More Law Ctr. v. Obama*, No. 10-2388, 2011 WL 2556039, at \*9 (6th Cir. June 29, 2011) (discussing cases from 1942 and 2005 in which the Court upheld provisions because they were part of a broad regulation of interstate commerce).

<sup>8</sup> According to the Court, the federal government is entitled to worry that marijuana grown for personal medical purposes might be diverted into the illicit drug distribution chain. See *Gonzales v. Raich*, 545 U.S. 1, 19 (2005) (“The . . . concern making it appropriate to include marijuana grown for home consumption in the [Controlled Substances Act] is the likelihood that the high demand in the interstate market will draw such marijuana into that market.”).

<sup>9</sup> See *Thomas More Law Ctr.*, 2011 WL 2556039, at \*12 (concluding that the individual mandate is an essential part of a broader regulatory scheme). But see *Florida v. U.S. Dep’t Health & Human Servs.*, Nos. 11-11021, 11-11067, 2011 WL 3519178, at \*64 (11th Cir. Aug. 12, 2011) (“Congress’s statutory reforms of health insurance products—such as guaranteed issue and community rating—do not reference or make their implementation in any way dependent on the individual mandate.”).

<sup>10</sup> See, e.g., *Florida v. U.S. Dep’t Health & Human Servs.*, No. 10-00091, 2011 WL 285683, at \*24 (N.D. Fla. Jan. 31, 2011); *Constitutionality of the Individual Mandate Before H. Comm. on the Judiciary*, 112th Cong. 27 (2011) [hereinafter *Constitutionality of the Individual Mandate*] (statement of Randy E. Barnett, Professor, Georgetown University Law Center).

virus that was easily transmitted from one person to another and that was highly lethal. Suppose further that broccoli contained a natural vaccine for the new virus. In that situation, Congress could require people to eat broccoli.<sup>11</sup> When it comes to interpreting the power of the federal government, context really matters.

To put it another way, the legislative powers include the power to “make all laws . . . necessary and proper for carrying into execution” any enumerated power of Congress.<sup>12</sup> The Commerce Clause power allows Congress to prohibit insurers from discriminating on the basis of an applicant’s health status, and the Necessary and Proper Clause allows Congress to impose an individual mandate to make the anti-discrimination ban work.<sup>13</sup>

### B. *Activity Versus Inactivity: A Distinction in Search of a Theory*

Critics emphasize another argument against the individual mandate. They claim that Commerce Clause doctrine includes an important distinction between the regulation of activity and the regulation of inactivity.<sup>14</sup> In this view, Congress can shape economic transactions once they are undertaken, but Congress cannot require people to undertake economic transactions in the first place. Otherwise, there would be no meaningful limits to the Commerce Clause power.

The critics are correct that the Constitution imposes real limits on the national government’s powers. State governments may enjoy plenary powers to protect the public welfare, but the national govern-

---

<sup>11</sup> Under its Commerce Clause power, Congress may pass laws to protect persons traveling in interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558 (1995). Therefore, the broccoli mandate could be justified as a way of preventing interstate travelers from infecting one another with the virus.

<sup>12</sup> U.S. CONST. art I, § 8, cl. 18.

<sup>13</sup> Hall, *supra* note 1, at 1841 (“[I]t appears inescapable that compulsory insurance is necessary and proper in the particular context of PPACA to achieve Congress’s regulatory goal of requiring health insurers to accept all applicants regardless of health condition.”); see also *Raich*, 545 U.S. at 5 (invoking the Commerce Clause and the Necessary and Proper Clause to justify federal regulation of the local cultivation and use of marijuana for medicinal purposes); *id.* at 34-35 (Scalia, J., concurring) (finding that although Congress could not regulate intrastate commerce under the Commerce Clause alone, it could regulate intrastate commerce where such regulation was necessary and proper to regulate interstate commerce).

<sup>14</sup> See *Thomas More Law Ctr.*, 2011 WL 2556039, at \*14 (describing challengers’ argument that the individual mandate is unconstitutional “because it regulates inactivity”); *Florida v. U.S. Dep’t Health & Human Servs.*, No. 10-00091, 2011 WL 285683, at \*23 (N.D. Fla. Jan. 31, 2011) (concluding that “‘activity’ is an indispensable part” of the analysis of Congress’s Commerce Clause power).

ment is a government of limited powers. However, as Professor Hall explains, the Supreme Court has generally abandoned the use of formal distinctions like activity versus inactivity to cabin the Commerce Clause power.<sup>15</sup> Rather, the Court takes a largely functional approach that looks to the purposes behind the Commerce Clause. More specifically, the Court asks whether Congress is regulating a matter of national concern like illegal drug distribution, which Congress may do, or whether Congress is trying to regulate a matter of local concern, like K-12 education, which Congress may not do.<sup>16</sup> In the case of the individual mandate, we have the regulation of the health insurance industry, and that is a matter of national concern.<sup>17</sup>

To be sure, the Court has retained one formal distinction—that between economic and noneconomic activity. However, the formal distinction between economic and noneconomic activity is closely linked to the functional goal of distinguishing between matters that relate to regulation of the national economy and those that relate to regulation of local concerns.

Even if there is a place for additional formal distinctions in Commerce Clause doctrine, the activity-inactivity distinction is not a good candidate for the role. As Professor Hall observes, there is no connection between the activity-inactivity distinction and the distinction between national and local concerns.<sup>18</sup> Failure to buy health insurance—a kind of inactivity—is a matter of national concern, while the violent assault of a woman—a kind of activity—is a matter of local concern.<sup>19</sup> Indeed, the activity-inactivity distinction never has served

---

<sup>15</sup> The Supreme Court formerly distinguished between direct and indirect effects on commerce, between trade and manufacturing, and between goods flowing in commerce from those that had left the flow or had not yet entered it. Hall, *supra* note 1, at 1836.

<sup>16</sup> *Id.* at 1838 n.51 (noting examples of local concerns); see also *Lopez*, 514 U.S. at 564-68 (same).

<sup>17</sup> See *Thomas More Law Ctr.*, 2011 WL 2556039, at \*13 (“As plaintiffs concede, Congress has the power under the Commerce Clause to regulate the interstate markets in health care delivery and health insurance.”). But see *Florida v. U.S. Dep’t Health & Human Servs.*, Nos. 11-11021, 11-11067, 2011 WL 3519178, at \*59 (11th Cir. Aug. 12, 2011) (characterizing the regulation of the health insurance industry as a matter of traditional state concern).

<sup>18</sup> Hall, *supra* note 1, at 1837-38 (“Setting tighter boundaries according to action versus inaction would have little to do with the federalism concerns underlying the granting of commerce power.”).

<sup>19</sup> See *United States v. Morrison*, 529 U.S. 598, 617-19 (2000) (observing that there is “no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims”).

as a bulwark against an overly expansive Commerce Clause power. As I demonstrate in another piece, the federal government can achieve the same results by regulating economic activity as it could achieve by regulating economic inactivity.<sup>20</sup> For example, instead of simply requiring people to buy broccoli, Congress could require people to buy broccoli when they purchase any other foods.<sup>21</sup> Purchase mandates are a common form of activity-based regulation. For example, the federal government requires people to buy seat belts when they purchase cars<sup>22</sup> and V-Chips when they buy television sets.<sup>23</sup>

One can illustrate the failure of the activity-inactivity distinction in another way. To support their argument, critics cite to potential implications of a power to regulate inactivity.<sup>24</sup> In their view, an authority to regulate inactivity would lead to an excessively broad power for the federal government. This is a legitimate concern. Courts should not employ principles that have undesirable consequences. What, then, are the undesirable consequences that might result from a federal power to regulate inactivity? The critics invoke absurd hypothetical laws. For example, Judge Roger Vinson worried that Congress might require everyone above a certain income threshold to buy a General Motors car to support a company that is subsidized by taxpayers and an industry that is important to the domestic economy.<sup>25</sup> According to this hypothetical, the federal government would require tens of millions of Americans to purchase a new motor vehicle.<sup>26</sup> But

---

<sup>20</sup> See David Orentlicher, *Can Congress Make You Buy Broccoli? And Why It Really Doesn't Matter*, 84 S. CAL. L. REV. POSTSCRIPT 9, 12 (2011), [http://lawweb.usc.edu/why/students/orgs/lawreview/documents/SCalPostscript84\\_Orentlicher.pdf](http://lawweb.usc.edu/why/students/orgs/lawreview/documents/SCalPostscript84_Orentlicher.pdf) (“For any economic decision that Congress could reach by regulating economic inactivity, Congress also could reach that decision by regulating economic activity.”).

<sup>21</sup> *Id.* at 12-13. For people who farm their own food, Congress could require them to cultivate broccoli with their other crops. *Id.* at 13.

<sup>22</sup> 49 C.F.R. § 571.208 (2011).

<sup>23</sup> 47 U.S.C. § 303(x) (2006). V-Chips allow parents to block the display of television programming with violent, indecent, or sexual content. *V-Chip: Viewing Television Responsibly*, FED. COMM. COMMISSION, <http://transition.fcc.gov/vchip/> (last visited Sep. 1, 2011).

<sup>24</sup> See, e.g., *Florida v. U.S. Dep't Health & Human Servs.*, No. 10-00091, 2011 WL 2856883, at \*24 (N.D. Fla. Jan. 31, 2011) (discussing potential mandates to purchase broccoli or General Motors automobiles); *Constitutionality of the Individual Mandate*, *supra* note 10, at 27 (statement of Randy E. Barnett] (discussing potential mandates to exercise, eat broccoli, or buy a car).

<sup>25</sup> *Florida v. U.S. Dep't Health & Human Servs.*, No. 10-00091, 2011 WL 2856883, at \*24 (N.D. Fla. Jan. 31, 2011). Other hypothetical mandates include a requirement to purchase broccoli or an exercise club membership.

<sup>26</sup> There are more than 200 million Americans who are 18 years of age or older. U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS, available at <http://quickfacts>.

GM only needs to sell two million cars a year to break even,<sup>27</sup> and GM could not possibly manufacture the number of cars that a GM-purchase mandate would require.<sup>28</sup> When the potential implications of a power to regulate inactivity are highly implausible, why should we worry about those possibilities?<sup>29</sup>

## II. EXPANDING PROFESSOR HALL'S ANALYSIS

### A. *The Taxing Power*

Professor Hall rightly identifies the Commerce Clause and the Necessary and Proper Clause as the strongest sources of authority for the individual mandate. However, he is probably too quick to dismiss the taxing power as a source of authority for the individual mandate. Under Article I, Section 8, Congress has the "Power To lay and collect Taxes . . . to . . . provide for the . . . general Welfare of the United States."<sup>30</sup> And this is a very broad power. As long as the tax serves the general welfare and has a nonexclusive, revenue-raising purpose, it is valid.<sup>31</sup>

There are good reasons to view the individual mandate as an exercise of the taxing power. Congress placed the mandate in the Internal Revenue Service part of the U.S. Code,<sup>32</sup> and people who do

---

census.gov/qfd/states/00000.html (reporting that the U.S. population stands at more than 300 million Americans, with more than 75% older than 18). About 40% of U.S. households have a family income of at least \$50,000. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, at 452 tbl. 689, available at <http://www.census.gov/compendia/statab/2011/tables/11s0689.pdf>.

<sup>27</sup> Nick Bunkley, *Resurgent G.M. Posts 2010 Profit of \$4.7 Billion*, N.Y. TIMES, Feb. 25, 2011, at B1.

<sup>28</sup> Consider as well how a GM mandate would drive up costs for steel, glass, and other components of cars.

<sup>29</sup> Even if Congress wanted to pass a GM mandate, it could do so by requiring people to buy GM when voluntarily engaged in the economic activity of purchasing a car.

<sup>30</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>31</sup> See Brief of Constitutional Law Professors as Amici Curiae in Support of Defendants-Appellees at 10-11, *Thomas More Law Ctr. v. Obama*, No. 10-2388 (6th Cir. June 29, 2011) (explaining the broad scope of the taxing power). The tax also must not violate any other constitutional provisions, such as the protections included in the Bill of Rights. *Id.*; see also *Liberty Univ. Inc. v. Geithner*, No. 10-2347, 2011 WL 3962915, at \*20 (4th Cir. Sept. 8, 2011) (Wynn, J., concurring) (arguing that to be constitutional, taxes must be "reasonably related to raising revenue; . . . serve the general welfare; and . . . not infringe upon any other right").

<sup>32</sup> See *Liberty Univ.*, No. 10-2347, 2011 WL 3962915, at \*19 (Wynn, J., concurring) ("The individual mandate exaction in 26 U.S.C. § 5000A(b) amends the Internal Revenue Code . . ."); Brian Galle, *The Taxing Power, the Affordable Care Act, and the Limits of Con-*



not purchase insurance will have to pay a fee to the IRS equal to 2.5% of taxable income above the personal exemption, with a minimum payment of \$695.<sup>33</sup> Instead of describing the 2.5% levy as a penalty for the failure to buy insurance, one can readily characterize the 2.5% levy as an income tax that will help cover the costs of health care for the indigent, with people qualifying for an exemption from the tax if they purchase a health insurance policy.<sup>34</sup>

But what about the fact that the main purpose of the 2.5% levy is to persuade people to buy health care coverage, not to raise revenue? At one time, the Supreme Court would strike down taxes on the ground that they were regulatory rather than revenue-raising in nature. However, the Court abandoned the distinction between regulatory and revenue-raising taxes decades ago.<sup>35</sup> And Congress often uses

*stitutional Compromise*, 120 YALE L.J. ONLINE 407, 409 (2011), <http://yalelawjournal.org/2011/4/5/galle.html> (arguing that “[i]t takes a particularly obstinate—even hostile—reading of the IRR provision to find that it is not labeled a ‘tax’”).

<sup>33</sup> Health Care and Education Reconciliation Act of 2010 § 1002, PPACA § 10106(b), 26 U.S.C.A. § 5000A(c)(2) (West Supp. 1A 2010). The minimum payment of \$695 will be phased in from 2014 to 2016, and the maximum payment will be capped at the average national cost of a health insurance policy with “bronze level” coverage under the statute. *Id.*

<sup>34</sup> *Cf. Liberty Univ.*, No. 10-2347, 2011 WL 3962915, at \*17 (Wynn, J., concurring) (“To determine whether an exaction constitutes a tax, the Supreme Court has instructed us to look not at what an exaction is called but instead at what it does,” (citing *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941))).

<sup>35</sup> As the Court has explained:

It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. The principle applies even though the revenue obtained is obviously negligible, or the revenue purpose of the tax may be secondary. Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate.

*United States v. Sanchez*, 340 U.S. 42, 44 (1950) (internal citations omitted); *see also* *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937) (“[A] tax is not any the less a tax because it has a regulatory effect . . . .”); *Liberty Univ.*, No. 10-2347, 2011 WL 3962915, at \*18 (Wynn, J., concurring) (“[B]oth older and newer opinions indicate that the revenue-versus-regulatory distinction was short-lived and is now defunct.”).

This point disposes of the argument made by some scholars who invoke the distinction between a revenue-raising tax, which automatically falls under the taxing power, and a regulatory tax, which requires an independent source of authority. *See, e.g.*, Erik M. Jensen, *The Individual Mandate and the Taxing Power*, 38 N. KY. L. REV. (forthcoming 2011) (manuscript at 18-22), available at <http://ssrn.com/abstract=1683462>.

Relatedly, critics incorrectly argue that the individual mandate does not qualify under the taxing power because it would not raise any revenue if it worked perfectly. *See, e.g.*, ROBERT A. LEVY, *THE CASE AGAINST PRESIDENT OBAMA’S HEALTH CARE REFORM: A PRIMER FOR NONLAWYERS* 4 (2011), available at <http://www.cato.org/pubs/ftpapers/ObamaHealthCareReform-Levy.pdf>. That is, if everyone subject to the

its taxing power to encourage desirable behavior or to discourage undesirable behavior. For example, Congress enacted a mortgage interest deduction to encourage the purchase of homes, and it has passed a cigarette tax to discourage smoking. Accordingly, as mentioned above, a tax need only have a *nonexclusive* revenue-raising purpose.

Critics of the Taxing Clause argument claim that Congress did not employ its taxing power to pass the individual mandate. Indeed, Congress consciously characterized the 2.5% levy as a penalty rather than a tax, and Congress also cited the Commerce Clause as the source of its authority to enact the mandate. According to this claim, it is not that Congress was unable to use its taxing power to pass the individual mandate. Rather, it is argued, Congress did not in fact exercise its taxing power to enact the individual mandate.<sup>36</sup>

Does it matter whether or not Congress characterized the individual mandate as an exercise of its commerce or taxing power? In ruling on a recent challenge to the mandate, Judge Gladys Kessler wrote that courts will not ignore the language of a statute and substitute different language.<sup>37</sup> Congress called the 2.5% levy a “penalty,” and

---

mandate actually purchased insurance, then no levies would be collected. But that argument can be made about other taxes that the Court has upheld. For example, Congress passed a tax on marijuana distribution before it made the sale of marijuana illegal under federal law. See *Sanchez*, 340 U.S. at 43 (noting the objectives of the marijuana tax); Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1048, 1083-85 (1970) (explaining the workings of the marijuana statute). If the tax discouraged everyone from selling marijuana, then the government would have collected no money from the tax. Note, however, that taxes on illicit activities can run afoul of the privilege against self-incrimination if they have reporting requirements. See *Marchetti v. United States*, 390 U.S. 39, 48-61 (1968) (upholding the defendant’s Fifth Amendment privilege in a case involving violations of federal wagering tax statutes).

<sup>36</sup> Some critics suggest that the 2.5% levy must be viewed as a penalty rather than a tax regardless of congressional intent. See, e.g., *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 784-86 (E.D. Va. 2010) (describing the argument made by Virginia’s attorney general). But that argument rests on outdated precedent and a misreading of recent precedent. See *infra* note 39. Critics also argue that the individual mandate would constitute an unconstitutional direct tax, but that argument ignores the point that the mandate can be characterized as a 2.5% tax on income, with an exemption for those who purchase health care coverage. See *supra* text accompanying notes 32-33.

<sup>37</sup> *Mead v. Holder*, 766 F. Supp. 2d 16, 40-41 (D.D.C. 2011) (concluding that Congress intended for the payment to be a punitive measure and not a revenue-raising tax); see also *Florida v. U.S. Dep’t Health & Human Servs.*, Nos. 11-11021, 11-11067, 2011 WL 3519178, at \*69 (11th Cir. Aug. 12, 2011) (“The plain language of the individual mandate is clear that the individual mandate is not a tax, but rather, as the statute itself repeatedly states, a “penalty” . . . .”); *Thomas More Law Ctr. v. Obama*, No. 10-2388, 2011 WL 2556039, at \*18 (6th Cir. June 29, 2011) (Sutton, J., concurring in part

courts therefore should not rewrite the statute to say “tax.” Fidelity to the statutory text is important when deciding the reach of the statute. For example, we should assume that Congress would not want courts to rewrite a 2.5% tax to make it a 3.5% tax. However, fidelity to statutory language is not important when deciding whether the statute is valid. There is no reason why we should assume that Congress cares whether the individual mandate is upheld under the taxing power instead of the Commerce Clause power.

Indeed, both doctrine and theory suggest that it should not matter which power Congress invoked to justify the individual mandate. The Supreme Court has held that the constitutionality of a law does not have to be based only on a power identified by Congress as its source of authority. Rather, a law will be found constitutional if any valid source of authority exists.<sup>38</sup> Doctrine, then, supports the taxing power justification for the individual mandate.<sup>39</sup>

---

and delivering the opinion of the court in part) (“Words matter, and it is fair to assume that Congress knows the difference between a tax and a penalty . . .”).

<sup>38</sup> See *EEOC v. Wyoming*, 460 U.S. 226, 243-44 n.18 (1983) (“It is in the nature of our review of congressional legislation defended on the basis of Congress’s powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words ‘section 5’ or ‘Fourteenth Amendment’ or ‘equal protection . . .’”); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) (“The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”); see also *Liberty Univ.*, No. 10-2347, 2011 WL 3962915, at \*17 n.3 (Wynn, J., concurring) (“Congress also does not have to invoke the source of authority for its enactments.”).

<sup>39</sup> In at least one case, the Court has found an important distinction between penalties and taxes. However, the issue in that case was whether the levy would be treated as an excise tax in bankruptcy proceedings, not whether it constituted a constitutionally valid levy. See *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 215 (1996) (“This case presents two questions . . . first, whether the exaction is an ‘excise tax’ for purposes of 11 U.S.C. § 507(a)(7)(E) (1988 ed.), which at the time relevant here gave seventh priority to a claim for such a tax . . .”). In another case involving bankruptcy proceedings, the Court identified a levy as a tax, even though the statute described the levy as a penalty. See *United States v. Sotelo*, 436 U.S. 268, 275 (1978) (addressing the failure of an employer to pay to the IRS monies that had been collected in the form of withholding taxes from employee wages).

Critics of the taxing power argument cite *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994), in which the Court looked to the nature of a levy and concluded that it was a penalty even though it was labeled a tax. See, e.g., *Thomas More Law Ctr.*, 2011 WL 2556039, at \*19-21 (Sutton, J., concurring in part and delivering the opinion of the court in part). In that case, Montana imposed a tax on the possession of illegal drugs. *Kurth Ranch*, 511 U.S. 767, 769 (1994). However, *Kurth Ranch* stands only for the proposition that a tax can become so punitive—in that case it amounted to eight times the market value of the drugs—that it can raise double jeopardy concerns. *Id.* at

Principles of constitutional theory also support the taxing power justification. According to Judge Vinson, upholding the individual mandate under the taxing power would compromise the Constitution's basic principle of accountability. Congress and President Barack Obama characterized the 2.5% levy as a penalty rather than a tax because they knew that taxes are unpopular. It would be wrong, in this view, to allow Congress to disguise its motives when enacting a statute and thereby make it more difficult for the public to hold members of Congress responsible for their decisions.<sup>40</sup> If Congress wants to employ its politically controversial taxing power, then it must acknowledge that it is doing so. However, there is no accountability problem from the federal government's decision to change its asserted justification for the individual mandate. Now that Congress and the President have acknowledged that they enacted a tax, the public can hold them accountable. Indeed, voters arguably did just that in November 2010 when Republicans secured a majority in the House of Representatives and reduced the Democratic majority in the Senate from 59 to 53. More importantly, for voters who do not want to pay more of their income to the government, it is irrelevant whether they will have to pay more in the form of a "penalty" or in the form of a "tax." Voters are not so easily fooled.

The accountability concern is relevant when voters do not know whom to hold responsible for legislation. When Congress imposes a mandate that state or local government officials must enforce, then voters may blame the state or local officials for the mandate.<sup>41</sup> Thus, when Congress adopted a national background check for gun purchasers, the Court rejected a temporary provision requiring local law enforcement personnel to perform the background checks.<sup>42</sup> Gun

---

780-83 (observing that among other factors, the tax was "conditioned on the commission of a crime"). The individual mandate is not so punitive.

<sup>40</sup> The levy was not termed a tax, in part, to protect President Obama and members of Congress from charges that they were abandoning pledges not to raise taxes. See *Florida v. U.S. Dep't Health & Human Servs.*, 716 F. Supp. 2d 1120, 1142-43 (N.D. Fla. 2010) (discussing the argument that because taxes are the most scrutinized exercise of governmental power, the word "penalty" was used instead).

<sup>41</sup> See *Printz v. United States*, 521 U.S. 898, 929-30 (1997) (explaining that where states either have to pay for or implement a federal program, the states are "put in the position of taking the blame for its burdensomeness and for its defects"); *New York v. United States*, 505 U.S. 144, 169 (1992) ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.").

<sup>42</sup> *Printz*, 521 U.S. at 930.

buyers who did not like the background check could easily blame the local sheriff conducting the check and vote that person out of office.<sup>43</sup> But voters know exactly who to blame if they do not like the individual mandate to purchase health care coverage.

To be sure, it is easy to sympathize with Judge Vinson's desire to hold elected officials to their word. It is troubling when presidents or members of Congress say one thing when trying to pass a bill and another thing once the bill has passed. But this is a matter for voters to take into account on election day, and not the basis for a constitutional decision by judges. Aside from the First Amendment and separation-of-powers concerns, if courts were to police political debate, few acts by Congress or the president would be immune from challenge. Recall, for example, the testimony on behalf of the Bush Administration by Office of Management and Budget Director Mitch Daniels that a war against Iraq would cost \$50 to 60 billion.<sup>44</sup> As the price tag has soared past \$700 billion,<sup>45</sup> should a court now find the war unconstitutional?

### *B. Political Preferences Clothed as Constitutional Arguments*

If the constitutional arguments against the individual mandate are weak, then why have they persuaded federal district court judges, and why have they resonated with so many members of the public? Undoubtedly, there are strong political reasons at work here. Many Americans did not want Congress to pass the health care legislation. If the Supreme Court were to invalidate the individual mandate, then it will not matter that Congress could reenact the same mandate by expressly invoking its taxing power the second time around. Democrats no longer hold enough seats in the House and Senate to pass a revised individual mandate. In addition, senior citizens are less supportive of the legislation than younger voters, likely reflecting the fact that much of the funding for the statute will come from reductions in Medicare spending.<sup>46</sup>

---

<sup>43</sup> *Id.*

<sup>44</sup> Elisabeth Bumiller, *White House Cuts Estimate of Cost of War with Iraq*, N.Y. TIMES, December 31, 2002, at A1.

<sup>45</sup> See Casey B. Mulligan, *The Costs of War*, N.Y. TIMES ECONOMIX BLOG (Aug. 25, 2010, 6:00 AM), <http://economix.blogs.nytimes.com/2010/08/25/the-costs-of-war> (noting that the estimate covers costs from 2003 to 2010).

<sup>46</sup> See THE HENRY J. KAISER FAMILY FOUND., KAISER HEALTH TRACKING POLL 7 (Mar. 2011), *available at* <http://www.kff.org/kaiserpolls/upload/8166-F.pdf> (noting that over half of seniors disapprove of the law).

Still, we are left with the paradox that the public generally likes the individual components of the health care law but, overall, has an unfavorable view of the law.<sup>47</sup> If people like most parts of the law, then why do they not like the bill as a whole? Perhaps dissatisfaction with some provisions outweighs the approval of the other provisions.

Or, the public mood about the health care law may really reflect the public mood about the economy. As the economy continues to struggle, people are displeased with the high rate of unemployment, the lack of job security, and the decline in housing prices. There is good reason to think that public anger is being vented in the form of opposition to the health care legislation. In effect, the public may be saying to the President and Congress, “Why were you putting so much effort into health care reform when we wanted you to put all of your effort into economic recovery?” To put it another way, Congress should have been using its Commerce Clause power to improve the economy, not to reform the health care system. In this view, the decision by Congress to divert the Commerce Clause power to pass an individual mandate is a metaphor for Congress’s diverting its attention away from the economy. Once the economy recovers, public opposition to the health care law may well dissipate.

Even to the extent that public anger reflects direct antipathy toward the individual mandate, the constitutional arguments are unpersuasive. As Professor Hall observes, critics of the mandate typically view it as too much of an invasion of individual liberty.<sup>48</sup> People, it is said, should have the right to decide whether they want to purchase health insurance.<sup>49</sup> But if that is the case, then the argument against the individual mandate should be based on principles of due process that apply to state and federal governments alike.<sup>50</sup> The Commerce Clause and taxing power arguments might stop a federal mandate to purchase insurance, but they would not block a state mandate, like the one that Massachusetts passed in 2006. Of course, mandate critics cannot invoke the Due Process Clause’s right to individual liberty—

---

<sup>47</sup> See THE HENRY J. KAISER FAMILY FOUND., KAISER HEALTH TRACKING POLL 4-6 (Nov. 2010), *available at* <http://www.kff.org/kaiserpolls/upload/8120-F.pdf> (illustrating that a majority of voters supported five out of the six components that were part of the poll).

<sup>48</sup> Hall, *supra* note 1, at 1838.

<sup>49</sup> *Id.*

<sup>50</sup> See *Thomas More Law Ctr. v. Obama*, No. 10-2388, 2011 WL 2556039, at \*32 (6th Cir. June 29, 2011) (Sutton, J., concurring in part and delivering the opinion of the court in part) (discussing the due process considerations of the individual mandate).

the Supreme Court abandoned its protection of economic due process long ago.<sup>51</sup>

In the end, the argument against the individual mandate cannot be justified in terms of controlling Supreme Court precedent. To invalidate the mandate, the Court would have to revive long-abandoned constitutional doctrine.<sup>52</sup> But there were good reasons for the Court to adopt its modern Commerce Clause and taxing power doctrines, and those reasons counsel against a decision to invalidate the individual mandate.

---

Preferred Citation: David Orentlicher, Response, *Constitutional Challenges to the Health Care Mandate: Based in Politics, not Law*, 160 U. PA. L. REV. PENNUMBRA 19 (2011), <http://www.pennumbra.com/responses/09-2011/Orentlicher.pdf>.

---

<sup>51</sup> See Hall, *supra* note 1, at 1829 (referring to the Court's repudiation of *Lochner* jurisprudence in the late 1930s).

<sup>52</sup> Or, the Court would have to carve out a special rule for this particular mandate. While it would be difficult to justify a special rule under current Court doctrine, it would not be the first time that the Court took such a path. Recall *Bush v. Gore* and the Court's decision that was designed for one case only. 531 U.S. 98, 109 (2000). But in that case, the Court was at least able to invoke equal protection principles in a way that it cannot invoke Commerce Clause principles to strike down the individual mandate.