

Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

2010

# The National Individual Health Insurance Mandate: Ethics and the Constitution

Lawrence O. Gostin
*Georgetown University Law Center*, gostin@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/430

Hastings Center Rep., Sept./Oct. 2010, at 8-9

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub

 Part of the Constitutional Law Commons, and the Health Law and Policy Commons

# GEORGETOWN LAW

## Faculty Publications



Georgetown Public Law and Legal Theory Research Paper No. 10-53
September 2010


# The National Individual Health Insurance Mandate: Ethics and the Constitution


Hastings Center Rep., Sept./Oct. 2010, at 8-9



Lawrence O. Gostin
Professor of Global Health Law
Georgetown University Law Center
gostin@law.georgetown.edu



This paper can be downloaded without charge from:
Scholarly Commons: http://scholarship.law.georgetown.edu/facpub/430/
SSRN: http://ssrn.com/abstract=1674451

Posted with permission of the author

# The National Individual Health Insurance Mandate

by Lawrence O. Gostin

On March 23, 2010, President Obama signed into law the nation's first comprehensive health care reform bill, the Patient Protection and Affordable Care Act. Within weeks, twenty states filed lawsuits challenging the constitutionality of its most politically charged feature—an individual purchase mandate. By 2014, the bill requires most individuals to have health insurance. With certain exceptions (pertaining to income level and religious objections), individuals without qualifying coverage will pay an annual tax penalty reaching the greater of $695 ($2,085 per family maximum) or 2.5 percent of household income.[1]

If anything, the tax penalty is too low compared with the cost of insurance, so it may not provide sufficient incentive for healthy individuals to purchase insurance. But it remains controversial because it compels people to purchase coverage they choose not to have, raising the question whether Congress can lawfully and ethically require individuals to contract with, and transfer money to, a private party.[2] To be sure, the individual mandate lacks a clear American precedent. (It has worked successfully in other countries, such as Australia.) Compulsory automobile insurance, for example, is a state requirement, operates as a condition of exercising the privilege of driving, and requires coverage for injuries to others (not the insured).

## Personal Freedom and Collective Goods in Conflict

Opposing a mandate is understandable when viewed from an individual perspective: it interferes with economic freedom and constrains personal choice. In economic terms, it represents a compelled cross-subsidy. However, when viewed from a collective perspective, the mandate offers valuable social benefits. The absence of health insurance creates harmful consequences, including lower quality of life, increased morbidity and mortality, and higher financial burdens.[3]

Since these adverse consequences fall mostly on those who lack insurance, the decision to seek insurance arguably should be left to them. However, government is responsible for the well-being of the community, not particular individuals. Even if the decision were primarily self-regarding, its effects—illness and death—can be felt by all.

Many individuals cannot afford insurance, but others *choose* not to insure; over nine million people with annual incomes over seventy-five thousand dollars had no coverage in 2007.[4] Yet many previously healthy people suffer illness or injury and end up requiring treatment in emergency departments, most of which is uncompensated. "Free riders" rely on society to pick up the costs (forty-three billion dollars in 2008) through higher insurance premiums (above one thousand dollars annually) and higher taxes (such as hospital subsidies, Medicaid, and Medicare). Individuals often delay purchasing insurance until they become ill, creating an "adverse selection" problem for insurers. At its worst, free-riding and adverse selection create a downward spiral of higher premiums and a shrinking insurance pool, making everyone's health care less affordable.[5]

## The Mandate's Constitutionality

The pivotal constitutional concern is that government will penalize individuals for *failing* to buy health insurance—for "doing nothing"—simply because they are legal residents of the United States. The states could undoubtedly mandate health coverage, as with the Massachusetts Health Care Reform Plan of 2006. But the federal government has limited power; its principal enumerated powers are to regulate interstate commerce and to tax for the general welfare. The Supreme Court, however, has broadly construed federal powers—known as the "implied powers" doctrine—to uphold laws that are "necessary and proper." By this reasoning, the Court ought to uphold the constitutionality of the health insurance mandate.

***The power to regulate interstate commerce.*** The Supreme Court has interpreted the commerce power broadly, applying it to virtually every aspect of economic and social life. Indeed, from 1937 to 1995, the Court did not invalidate a single federal statute on the ground that Congress lacked the power to regulate commerce. Critics claim, however, that the individual mandates do not regulate activity of any kind, whether economic or not, but rather regulate "doing nothing at all."[6] An individual decision not to purchase health insurance, they argue, also has negligible economic consequences, with purely personal and intrastate impacts.

Nothing could be farther from the truth. In terms of health, individuals never really "do nothing." Uninsured individuals self-insure, rely on family, and cost-shift to hospitals, the insured, and

taxpayers. The cumulative economic effects are vast. Health care captures more than 17 percent of gross domestic product. Health care professionals, pharmaceuticals, medical equipment, digital medical records, and insurance claims routinely move across state lines. The insurance industry, moreover, clearly operates within the stream of interstate commerce: marketing products, offering policies for sale, underwriting, and reimbursing claims. Low coverage rates and greater health care costs contribute to medical bankruptcies, unemployment, and reduced consumer spending and business competitiveness.

The Supreme Court has upheld far-reaching federal regulation on the ground that though individual economic activity may be negligible, collective consequences can become deeply consequential. In *Gonzales v. Raich*, the Court held that the commerce clause empowered Congress to prohibit personal cultivation and use of medical marijuana. The Court found "striking similarities" between *Raich* and a 1942 case upholding a federal prohibition on a farmer growing wheat for his own use.[7] The Court said that its prior decisions striking down the federal Gun-Free School Zones Act and the federal Violence Against Women Act, on the ground that those laws exceeded congressional authority, were read "far too broadly."[8]

***The power to tax.*** The individual mandate is enforced though a federal tax, enabling Congress also to rely on its enumerated power to raise taxes for the general welfare. The tax will generate revenues to help support health care reform. But it will do more than that by creating incentives to purchase health insurance.

The Supreme Court, in its early jurisprudence, expressed concern about federal taxes designed to punish or regulate rather than to raise revenue. Thus, the Court distinguished between revenue-raising taxes, which it upheld, and purely regulatory taxes, which it found constitutionally troubling. The distinction, however, has all but disappeared. For example, the Court has upheld federal taxes on concealed firearms and the medical prescribing of marijuana, stating that a "tax does not cease to be valid because it regulates, discourages, or even definitely deters the activities taxed."[9]

Today, a federal tax is likely to be constitutional unless it regulates behavior in a way extraneous to any tax need. The act's tax penalty is clearly constitutional because it helps pay the costs of reform (such as Medicaid expansion, health insurance subsidies, and state insurance exchanges) and corrects market failures (such as preexisting condition exclusions). The mandate, therefore, is essential for expanding access—the raison d'être of health care reform.

Critics claim the tax penalty simply avoids the political costs of raising income taxes to pay for social programs. But the state frequently and appropriately raises revenue for beneficial activities by taxing risky behaviors like smoking, drinking alcohol, and gambling. By doing so, the tax pays for a valuable service while discouraging unhealthy behavior—exactly what Congress intended with the health insurance mandate.

## Why the Mandate Is Vital

The state lawsuits are widely expected to reach a conservative-leaning, business-friendly Supreme Court sometime in 2011. The litigation may falter on procedural grounds: "ripeness" (the lawsuits were filed four years before the mandate takes effect, so plaintiffs cannot demonstrate current injury and can merely speculate whether they will be harmed) or "standing" (states have little stake in federal decisions to mandate individuals to purchase insurance).

If the Court were to reach the merits and invalidate the mandate, however, comprehensive health care reform could unravel. In theory, the mandate could be severed from the rest of the act's two-thousand-plus pages, but the sponsors rightly saw it as integral to reform. Private insurance companies could not, and would not, cover high-risk individuals unless they could spread the costs among a wide pool. And unless young, healthy people were given incentives to join the pool, they would opt out. They opt out now. And with the new ban on preexisting condition exclusions, they would have even more reason to delay buying insurance, as they could simply wait until they become ill. Absent a mandate, the insurance market would become highly dysfunctional.

Comprehensive health care reform envisages a social contract where everyone shares the cost; one that recognizes all of us may become ill one day. The mandate is not an unjustified limit on freedom, but rather is vital to a decent society. If the social contract must be accomplished the "American way"—through the private system—then the simple logic of insurance has to prevail, which is to spread the risk among everyone—rich and poor, healthy and sick, young and old alike. And for that to happen, the judiciary will have to uphold the individual purchase mandate.

1. E.E. Connors and L.O. Gostin, "Healthcare Reform: A Historic Moment in American Social Policy," *Journal of the American Medical Association* 303 (2010): 2521-22.

2. M.A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance* (Washington, D.C.: O'Neill Institute for National and Global Health Law, Georgetown University, 2009).

3. S. Dorn, *Uninsured and Dying Because of It: Updating the Institute of Medicine Analysis on the Impact of Uninsurance on Mortality* (Washington, D.C.: Urban Institute, 2008), http://www.urban.org/publications/411588.html.

4. United States Census Bureau, Health Insurance Coverage: 2008, http://www.census.gov/hhes/www/hlthins/hlthins.html.

5. L.O. Gostin and E.E. Connors, "Healthcare Reform in Transition: Incremental Insurance Reform without an Individual Mandate," *Journal of the American Medical Association* 303 (2010): 1188-89.

6. R. Barnett et al., "Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional," *Legal Memorandum*, no. 49 (Washington, D.C.: The Heritage Foundation, 2009).

7. *Wickard v. Filburn*, 317 U.S. 111 (1942).

8. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

9. *United States v. Kahriger*, 345 U.S. 22 (1953).