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## Out of Control Policy Blog

### Founders Against ObamaCare

**Shikha Dalmia**

December 11, 2009, 3:38pm

Many people have been wondering whether Democratic plans to force individuals to buy health insurance can withstand constitutional scrutiny given that in this country we are supposed to have a government of limited and enumerated powers. But the constitution's commerce clause gives Congress the authority to regulate interstate commerce. And Congress has made expansive use of this authority, thanks to a compliant Supreme Court.

In the 1942 *Wickard v. Filburn* case, the court ruled that Congress had the right to stop an individual farmer from growing wheat for his personal use - not for commercial sale, mind you - because otherwise he would undercut Congress' efforts to raise national wheat prices. The court essentially reaffirmed this far-fetched rationale in the 2005 *Gonzalez v. Raich* case when it ruled that Uncle Sam had the authority to go after individuals growing marijuana in states that had legalized medical marijuana - even though they had no intention of ever selling the marijuana across state lines.

So the question is if Congress can use the commerce clause to stop you from growing your own produce to maintain optimal produce prices, why can't it make you buy insurance in order to maintain optimal insurance prices? It is hard to see that the commerce clause can place any principled limits on Congress' authority to regulate any activity with a remote bearing on any interstate market.

But health insurance might be an exception. Robert Levy and Michael Cannon of the CATO Institute note that what the Dems are forgetting is the McCarran-Ferguson Act passed in 1945, which gave states absolute authority to regulate health insurance.

The perverse effect of the law has been to bar individuals from purchasing health insurance across state lines. But now it will also work against Congressional efforts to engineer a federal takeover of health care because the law essentially made insurance markets off-limits to Congressional meddling.

What's more, the tax that Reid wants to use to enforce the mandate might also be unconstitutional. Write Levy and Cannon:

The Senate bill attaches a penalty for not complying with the mandate to the Internal Revenue Code. But the penalty is not based on income, so it's not an income tax. And it's not based on the value of the policy not purchased, so it's not an excise tax. Instead, the tax is a fixed amount based on family size.

That means it's levied per person and 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.

But it won't be apportioned among states in this way. States that have more uninsured - as opposed to more people - will effectively end up paying a bigger tax than those that have fewer uninsured.

In short, should Congress in its infinite unwisdom proceed to pass the individual mandate, there might be legal grounds to mount a very serious legal challenge to it.

Whole Levy-Cannon column [here](#).

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