

# PROGRESSIVE MEDIA

**Efforts To Repeal Health Reform In The States**

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## Frequently Asked Questions

### Is health care unconstitutional? Specifically, the individual mandate?

- No. Legal scholars agree that the individual mandate passes constitutional muster. Lawsuits and legislation attempting to invalidate it amounts to nothing more than political grandstanding.
- In a 2005 decision, the Supreme Court clarified the scope of the commerce power and reaffirmed the core principle that dissident states cannot thwart national policy. Justice Antonin Scalia wrote, "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."
- In addition, Erwin Chemerinski, the dean of the University of California, Irvine School of Law, argued that since the 1930s the Supreme Court has accorded Congress broad tax and spend powers for the general welfare and given Congress the discretion to determine this.
- The individual mandate is originally a *conservative* idea that was proposed as an alternative to the Clinton Administration's health reform proposal during the 1990s. In fact, 4 current Senate Republicans co-sponsored legislation in the 1990s that included the individual mandate: Hatch, Grassley, Bennett and Bond.

### Who is trying to repeal reform?

- Several House members, including Rep. Michele Bachmann, as well as Sens. DeMint and McConnell introduced legislation seeking to repeal the health reform law President Obama just signed into law.
- 39 states have introduced or promised to introduce legislation that would exempt the state from complying with the individual mandate. The legislation has only passed in three states: Idaho, Virginia and Utah.
- 13 state attorneys general are suing the federal government arguing the health reform bill is an intrusion on state's rights. It also questions the individual mandate. It is worth noting that all but one attorney general is Republican, and at least four attorneys general (McCollum in Florida; Cox in Michigan; Corbett in Pennsylvania; and McMaster in South Carolina) are running for governor in 2010. Nevada Governor Gibbons is urging the attorney general to sue as well.
- Virginia Attorney General Ken Cuccinelli is also suing the federal government, arguing that the individual mandate is unconstitutional.

### How did this get started?

- The idea to exempt a state from an individual mandate started at the conservative Goldwater Institute. Arizona lawmakers passed the legislation and put it on the ballot in 2008. It failed. State lawmakers passed the legislation again and it is on the ballot in 2010.
- The conservative American Exchange Legislative Council (ALEC) is now coordinating the effort. It highlighted the bill as one of its "model legislation," urging lawmakers across the country to introduce similar bills. Lawmakers in 39 states have subsequently introduced, or agreed to introduce, the legislation. Only three states have signed it into law: Idaho, Virginia and Utah.

## Challenging Health Reform At The State Level

### STATE LAWSUITS

State Lawsuits	Party Affiliation of Governor	Party Affiliation of Attorney General
Florida	Crist - R	McCollum - R*
Alabama	Riley - R	King- R
Colorado	Ritter - D	Suthers - R
Idaho	Otter - R	Wasden - R
Louisiana	Jindal - R	Caldwell - D
Michigan	Granholm - D	Cox - R*
Nebraska	Heineman - R	Bruning - R
Pennsylvania	Rendell - D	Corbett - R*
Nevada	Gibbons - R**	Masto - D
South Carolina	Sanford - R	McMaster - R*
South Dakota	Rounds - R	Jackley - R
Texas	Perry - R	Abbott - R
Utah	Herbert - R	Shurtleff - R
Washington	Gregoire - D	McKenna - R
Virginia	McDonnell - R	Cuccinelli - R

\* Running for governor in 2010.

\*\* - Governor Gibbons and Rep. Heller are urging Masto to sue.

**State Attorneys General Filed Suit Arguing Health Reform Federal Intrusion And Rewrites The Federal-State Relationship.** "Officials in a dozen states who oppose the health care bill say they hope to block it in court by arguing that requiring people to buy [health insurance](#) is an unprecedented intrusion by the federal government into people's lives — the equivalent of going a step beyond simply regulating automobiles to requiring people to buy a car. They add that the bill would rewrite the relationship between federal and state government, and they plan to make their argument in court as soon as the legislation becomes law...Their arguments in court are likely to focus on the scope of the mandate and the intrusion of the federal government into state affairs, said David B. Rivkin Jr., a lawyer advising Florida who served in the Justice Department under President [Ronald Reagan](#) and the first President George Bush. 'This really goes to the heart of the constitutional architecture that the framers have devised' between the government and its citizens, Mr. Rivkin said. He also said that it would represent 'a qualitatively unprecedented expansion of federal authority at the expense of the states.'" [New York Times, [3/23/10](#)]

- Florida AG Will File A Lawsuit On Behalf Of Attorneys General In Alabama, Nebraska, North Dakota, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington And Louisiana.** "Florida's attorney general, Bill McCollum, is leading the effort to block the new bill, saying that it 'violates the U.S. Constitution and infringes on each state's sovereignty.' Mr. McCollum pledged to fight alongside attorneys general from Alabama, Michigan, Nebraska, North Dakota, Pennsylvania, South Carolina, South Dakota, Texas, Utah and Washington. Louisiana announced it would join the suit as well." [New York Times, [3/23/10](#)]

**VA Attorney General Plans To Argue Federal Health Reform Conflicts With State Law And Is 'An Incredible Federal Overreach.'** "In an interview Sunday, the Virginia attorney general, Ken Cuccinelli, said he intended to base his challenge on two grounds: that the federal bill conflicts with a newly passed state law that says no Virginian may be compelled to buy insurance, and that Congress does not have authority to

impose the mandate under its powers to regulate interstate commerce, as Democrats contend. 'This is such an incredible federal overreach,' Mr. Cuccinelli said, but added that he did not plan to ask the courts for an order that would prevent the bill from going into effect because the individual mandate does not take effect until 2013. 'On our basis for a constitutional challenge, there's no rush,' he said." [New York Times, [3/22/10](#)]

**Nevada Governor Urging State AG To Sue Federal Government Over Reform.** "Nevada Republican Rep. Dean Heller is joining Gov. Jim Gibbons in urging the state attorney general to sue the federal government over health reform legislation signed by President Barack Obama. In a letter to Attorney General Catherine Cortez Masto, Heller echoed concerns that the bill will create unfunded mandates for Nevada. He also questions the constitutionality of requiring everyone to obtain health insurance... Gibbons on Monday renewed his call for Masto, who is a Democrat, to sue the federal government, and said his administration would act on its own if she declines. Masto says the governor's office has no authority to take legal action on behalf of the state." [Associated Press, [3/23/10](#)]

## **HEALTH CARE OPT OUT LEGISLATION IN 39 STATES**

**39 States Have Passed, Introduced Or Said They Would Introduce, Legislation Saying No Person Can Be Forced To Purchase Health Insurance.** Legislators in 38 states have passed, introduced, or planned to introduce legislation that would essentially repeal health reform legislation in the state, saying that no person can be forced to buy health insurance. Two states have enacted the legislation into law: Virginia and Idaho. Arizona will put the measure before voters on the 2010 ballot. [America's Legislative Exchange Council, [3/22/10](#)]

The 39 states are:

- **Alabama** - The legislation is expected to be heard in the near future.
- **Alaska** - Introduced legislation.
- **Arizona** - State lawmakers placed the measure on the
- **Arkansas** - Introduced legislation.
- **Colorado**- A citizen-led initiative has been announced to put a similar measure on the ballot.
- **Florida** - Introduced legislation.
- **Georgia** - The state Senate passed a bill 31-16 that would allow residents to not comply with the individual mandate in the federal health reform bill after it could not obtain the votes necessary to for a constitutional amendment. The amendment needed 38 votes to pass but failed 34-19. [Atlanta Journal Constitution, [3/18/10](#)]
- **Idaho** - Gov. Otter signed legislation into law in March 2010.
- **Indiana** - Introduced legislation.
- **Iowa** - Introduced legislation.
- **Kansas** - The legislation is expected to be heard in the near future.
- **Kentucky** - Introduced legislation.

- **Louisiana** - Introduced legislation.
- **Maryland** - Introduced legislation.
- **Michigan** – The legislation is expected to be heard in the near future.
- **Minnesota** - Introduced legislation.
- **Mississippi** - Introduced legislation.
- **Missouri** – The state House passed a resolution saying no law will be able to compel a person to obtain health insurance by a vote of 109-46. [St. Louis Beacon, [3/17/10](#)]
- **Montana** – At least one lawmaker has publicly announced the intention to file the legislation;
- **Nebraska** - Introduced legislation.
- **New Hampshire** - Introduced legislation.
- **New Jersey** - Introduced legislation.
- **New Mexico** - Introduced legislation.
- **North Carolina** - At least one lawmaker has publicly announced the intention to file the legislation;
- **North Dakota** - Introduced legislation.
- **Ohio** - Introduced legislation.
- **Oklahoma** – The Oklahoma House passed House Joint Resolution 1054 by a vote of 77-10 to change the state constitution stop the federal government from forcing residents to purchase health insurance. [State Rep. Ritze, [3/11/10](#)]
- **Pennsylvania** - Introduced legislation.
- **Rhode Island** - At least one lawmaker has publicly announced the intention to file the legislation;
- **South Carolina** - Introduced legislation.
- **South Dakota** - Introduced legislation.
- **Tennessee** – The State Senate passed the 'Tennessee Health Freedom Act' by a vote of 26-1. [Tennessee Center for Policy Research, [2/17/10](#)]
- **Texas** - Introduced legislation.
- **Utah** – Governor Gary Herbert has made Utah the third state to pass the “Health Care Freedom Act” into law. House Bill 67 ([HB67](#)) was introduced by Rep. Carl Wimmer and passed the House and Senate by votes of 53-20 and 22-7, respectively.

- **Virginia** - Gov. McDonnell signed the legislation into law in March 2010.
- **Washington** - Introduced legislation.
- **West Virginia** - Introduced legislation.
- **Wisconsin** - Introduced legislation.
- **Wyoming** - Introduced legislation.

## **COST ESTIMATES**

**Gov. McDonnell Said Federal Health Reform Will Cost Virginia \$1 Billion More In Medicaid Spending From 2014-2026.** "According to Gov. Bob McDonnell (R), new state estimates show the federal health care overhaul will cost Virginia almost a \$1 billion more in Medicaid spending over a 12 year period beginning in 2014...'I think there's obviously some concern among our citizens and among governors and among people across the country about the breadth and scope of this health care reform,' he said.'It's an unfunded, long-term mandate on our Medicaid program.'" [Virginia Politics, Washington Post, [3/22/10](#)]

## Background Information On The Repeal Effort

### EFFORT FOR STATE OPT OUT LEGISLATION LED BY RIGHT WING GROUP ALEC

**ALEC Is The Organization Pushing This Freedom Of Choice Legislation.** The conservative American Legislative Exchange Council is the organization that is urging lawmakers in every state to introduce legislation that would nullify federal health reform. [www.alec.org]

- **Model Legislation Is Based On A 2008 Arizona Measure That Was Narrowly Defeated On The Ballot.** Arizona's Proposition 101: "The measure would block the state from enacting a universal health-insurance plan. If it passes, it would amend the state's constitution to say that no law 'shall impose any penalty or fine, of any type, for choosing to obtain or decline health care coverage or for participation in any particular health care system or plan.'" The proposal was narrowly defeated. [Health Blog, Wall Street Journal, [10/29/08](#)]
- **The Idea For The Arizona Initiative Began At The Right Wing Goldwater Institute.** "The idea of amending state constitutions to block the core of the federal health care legislation, including the requirement that individuals and businesses buy insurance, began at the conservative Goldwater Institute in Arizona, the state where the first such measure will appear on the ballot next year." [New York Times, [12/29/09](#)]

**ALEC's Health Care Legislation Developed In Part By Executive For Health Insurance Company Blue Cross Blue Shield.** "ALEC has promoted this 'tenther' legislation using its network of mostly far right Republican state lawmakers. The bills, which have been adopted in some form in 24 states so far, aim to invalidate federal regulations of health insurance, the public option and the individual mandate using the Tenther Amendment. According to the ALEC website, the resolution was developed by a three member task force of industry representatives. One of the members is Joan Gardner, who is executive director of state services with the BCBS Association's Office of Policy and Representation. In an interview with ThinkProgress, Christie Herrera, the director of ALEC's health task force, confirmed that Gardner played a pivotal role in crafting this anti-health reform states' rights initiative. Herrera told us that Gardner's unique position at the BCBS Association brought 'great knowledge' to the issue, and that Gardner voted to press forward with the campaign." [Think Progress, [12/5/09](#)]

**ALEC's 'Free Enterprise Board' Includes Drug Company Executives & Its Health Care Task Force Includes Lobbyists For Blue Cross Blue Shield.** "Five of the 24 members of its 'free enterprise board' are executives of drug companies and its health care "task force" is overseen in part by a four-member panel composed of government-relations officials for the Blue Cross and Blue Shield Association of insurers, the medical company Johnson & Johnson and the drug makers Bayer and Hoffmann-La Roche." [New York Times, [12/29/09](#)]

**Progressive State Network Urged President Obama To Pass Federal Health Reform & Criticized ALEC For Defending The Status Quo.** In a letter to President Obama and other leaders, the Progressive State Network said, "We contrast the dedication to substantive health care solutions by the more than 1,000 members of our group of legislators with the relative [handful of legislative members of the American Legislative Exchange Council \(ALEC\)](#) who choose not to propose substantive solutions for the American people, but just continue to defend the status quo and seek to obstruct health reforms that the large majority of Americans enthusiastically support. We all know that when it comes to health insurance coverage and the health care delivery system the status quo is not acceptable. The position of ALEC reflects its corporate sponsors; notably a [Blue Cross Blue Shield representative actually sits](#) on the three-person industry executive committee drafting ALEC's model legislation. Their approach would simply continue the widespread pattern

of insurance company abuses and excessive profiteering. That road is clearly not the answer." [Progressive State Network, [3/2/10](#)]

## **HEALTH REFORM COULD CREATE UP TO 4 MILLION JOBS IN THE NEXT DECADE**

An analysis by the Center for American Progress found that health reform could create up to 4 million jobs over the next decade, at an average of 250,000 to 400,000 annually. [Center for American Progress, [2/24/10](#)]

Here is a state by state breakdown of the estimated numbers of jobs that could be created by 2020:

- Alabama – 4,142
- Alaska - 639
- Arizona – 7,140
- Arkansas – 2,472
- California – 52,643
- Colorado – 8,196
- Connecticut – 3,542
- Delaware – 1,063
- District of Columbia – 1,958
- Florida – 17,417
- Georgia – 13,394
- Hawaii – 1,646
- Idaho – 1,613
- Illinois – 17,755
- Indiana – 7,220
- Iowa – 3,746
- Kansas – 3,307
- Kentucky – 3,493
- Louisiana – 3,224
- Maine - 433
- Maryland – 4,753
- Massachusetts – 4,143
- Michigan – 6,135
- Minnesota – 4,803
- Mississippi – 1,084
- Missouri – 4,846
- Montana - 694
- Nebraska – 2,361
- Nevada – 5,093
- New Hampshire – 1,623
- New Jersey – 10,281
- New Mexico – 1,376
- New York – 12,927
- North Carolina – 6,325
- North Dakota - 485
- Ohio – 7,423
- Oklahoma – 2,921
- Oregon – 5,073
- Pennsylvania – 8,288
- Rhode Island - 210

- South Carolina – 4,481
- South Dakota - 693
- Tennessee – 5,114
- Texas – 33,980
- Utah – 4,883
- Vermont - 556
- Virginia – 11,899
- Washington – 8,983
- West Virginia - 446
- Wisconsin – 7,144
- Wyoming - 887

## **MEDICAID EXPANSION**

**Gov. O'Malley Said Health Reform Bill Could Save Maryland \$1 Billion.** "Gov. Martin O'Malley (D) praised 'the courageous and important' votes taken Sunday by Congress on health care reform, a measure he said could save Maryland \$1 billion in the coming decade. Speaking to reporters late Monday afternoon, O'Malley predicted a 'net savings' to the state because it has been paying for several provisions that will be covered by the federal legislation, including costs associated with the 'donut hole' in Medicare prescription drug coverage and allowing young adults to be covered longer by their parents' plans. The governor said those savings would more than offset costs incurred by the state for covering additional Medicaid recipients. O'Malley said he will soon launch a task force, led by Lt. Gov. Anthony G. Brown (D) and state Health Secretary John M. Colmers, to explore other implications of the legislation for Maryland." [Maryland Politics, Washington Post, [3/22/10](#)]

**Expanded Medicaid Coverage.** The Center for American Progress examined the number of people who would be eligible for Medicaid under health reform legislation in the then-36 state legislatures that were considering opting out of reform. The [report](#) stated:

Comprehensive health care reform legislation is still pending in Congress, but 36 state legislatures have already taken steps to undermine key aspects of the legislation. If these efforts were to be enacted, these states would be left out of federal programs that would help them expand coverage for more of their residents, essentially refusing more than \$28 billion a year in federal funds from the Medicaid program alone.

Here is a state breakdown.

<b>State</b>	<b>Newly Eligible For Medicaid Expansion</b>	<b>Nonelderly Uninsured</b>
Alabama	226,142	545,100
Alaska	30,994	126,800
Arizona	23,339	1,198,200
Arkansas	147,355	472,900
Colorado	163,747	780,100
Florida	685,612	3,571,700
Georgia	454,168	1,656,900
Idaho	59,166	221,000
Indiana	211,673	734,600
Iowa	2,353	277,100
Kansas	88,596	334,800

Kentucky	260,528	619,800
Louisiana	291,967	813,000
Maryland	172,163	704,500
Michigan	227,685	1,126,000
Minnesota	111,619	434,000
Mississippi	226,044	523,200
Missouri	200,957	726,600
Montana	41,724	151,800
Nebraska	54,464	220,300
New Hampshire	33,423	133,600
New Mexico	116,945	446,200
North Carolina	392,693	1,448,600
North Dakota	15,794	67,500
Ohio	420,617	1,304,900
Oklahoma	202,499	558,400
Pennsylvania	283,314	1,174,000
Rhode Island	33,324	116,300
South Carolina	222,775	708,400
South Dakota	22,510	89,600
Tennessee	212,782	904,100
Utah	76,034	347,700
Virginia	264,778	1,025,400
Washington	209,878	759,100
West Virginia	94,679	260,400
Wyoming	19,141	71,000
<b>Total</b>	<b>4,510,959</b>	<b>16,080,900</b>

## **5 STATES HAVE REJECTED THE HEALTH REFORM OPT OUT LEGISLATION**

**South Dakota Senate Rejected Health Reform Nullification 23-11.** In a vote of 11 in favor and 23 against, the South Dakota Senate rejected SB137, a bill that would have nullified certain parts of the federal health reform in the state. [SB 137, [2/23/10](#)]

**North Dakota House Rejected Constitutional Amendment On State Health Care Choice 77-16.** The North Dakota House rejected a constitutional amendment to allow the freedom of choice in health care by a vote of 77-16. [North Dakota House Journal, 3/4/10, pg. [798](#)]

**The Tenth Amendment Center Notes Four States Where The Opt Out Legislation Has Failed Or Stalled In Committee.** According to the Tenth Amendment Center, a version of the health care opt-out legislation has either been rejected or stalled in committee in four states: Minnesota, Mississippi, North Dakota and Wyoming. [Tenth Amendment Center, Health Care Nullification Legislation, accessed [3/22/10](#)]

## **CONSERVATIVES HAVE EMBRACED THE INDIVIDUAL MANDATE BEFORE**

**Len Nichols: The Individual Mandate Was A Republican Idea Invented By Mark Pauly To Give George Bush Sr. An Alternative To An Employer Mandate.** "Len Nichols of the New America Foundation, the individual mandate was originally a Republican idea.'It was invented by Mark Pauly to give to George Bush Sr. back in the day, as a competition to the employer mandate focus of the Democrats at the time.'" [NPR, [2/15/10](#)]

**In 1993, Sen. John Chafee Introduced Health Bill That Included Individual Mandate; 4 Current Senators Co-Sponsored The Bill: Hatch, Grassley, Bennett And Bond.** "So while President Clinton was pushing for employers to cover their workers in his 1993 bill, John Chafee of Rhode Island, along with 20 other GOP senators and Rep. Bill Thomas of California, introduced legislation that instead featured an individual mandate. Four of those Republican co-sponsors — Hatch, Charles Grassley of Iowa, Robert Bennett of Utah and Christopher Bond of Missouri — remain in the Senate today." [NPR, [2/15/10](#)]

**Sen. Grassley Previously Made The Case For The Individual Mandate.** On *Fox News Sunday* in June 2009, Sen. Grassley said, "But when it comes to states requiring it for automobile insurance, the principle then ought to lie the same way for health insurance. Because everybody has some health insurance costs, and if you aren't insured, there's no free lunch. Somebody else is paying for it....I believe that there is a bipartisan consensus to have individual mandates." [Fox News Sunday, 6/14/09]

**Former Senate Majority Leader Bill Frist: 'An Individual Mandate for Health Insurance Would Benefit All.'** Former Senate Majority Leader Bill Frist wrote an op-ed in the *U.S. News & World Report* outlining the case for an individual mandate in health reform. He said an individual mandate would achieve fairness, eliminate the cost-shifting that occurs when the uninsured receive health care and it would reduce adverse selection. [Frist, U.S. News & World Report, [9/28/09](#)]

## **CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE**

**David Frum: Health Reform Is 'Unquestionably Constitutional. The Federal Government Already Requires Every American To Purchase Health Insurance. That's What Medicare Does.'** David Frum wrote: "Is the Obama-Reid health reform plan unconstitutional? The answer to that should be obvious: the Reid-Obama plan may be unwise, unsound, and unaffordable ... but it is unquestionably constitutional. The federal government already requires every American to purchase health insurance. That's what Medicare does. The difference now is that everyone will be required to buy a private plan to cover them up to age 65 in addition to the government-run plan they are compelled to buy to cover them after 65. I don't hear anyone in Congress suggesting that Medicare violates the Constitution. So how can the new plan be unconstitutional if the old plan is OK?" [David Frum, [12/26/09](#)]

**Since 1930s, Supreme Court Has Interpreted Commerce Clause To Mean Congress Can Regulate Activities That Have A Substantial Effect On Interstate Commerce.** "Since the 1930s, the Supreme Court has interpreted the Commerce Clause to mean that Congress has the authority to regulate activities that have a substantial effect on interstate commerce.'Substantial effect' can be found on individual decisions that, in the aggregate, would affect interstate commerce. In [Wickard v. Filburn](#), Filburn had violated wheat production quotas because he was growing extra wheat for personal consumption. The Court found that his actions, though minimal, would affect interstate commerce because it would reduce the amount of wheat he would need to purchase on the open market. More recently in [Gonzales v. Raich](#), the Supreme Court found that 'Congress could use its commerce clause authority to prohibit individuals from cultivating and possessing small amounts of marijuana for personal medicinal use because marijuana is bought and sold in interstate commerce.'" [Helen Wong, American Constitution Society, [11/9/09](#)]

**Justice Scalia: 'Congress May Regulate Even Noneconomical Local Activity If That Regulation Is A Necessary Part Of A More General Regulation Of Interstate Commerce.'** "Constitutional doctrine clearly gives Congress the authority to decide whether to enact the mandate. Congress has the power to regulate interstate commerce, which includes buying and selling insurance. In the Raich case in 2005, the U.S. Supreme Court clarified the scope of the commerce power and reaffirmed the core principle that dissident states cannot thwart national policy. Raich concerned a California program that legalized the use of marijuana for medical purposes. The California plan clashed with a federal law that criminalized private possession. In Raich, the court upheld the congressional ban by a vote of 6-3. Even Justice Antonin Scalia, no fan of expansive claims of federal power, voted to affirm Congress' authority. Justice Scalia explained, 'Congress may regulate

even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." [Robert Schapiro, Atlanta Journal Constitution, [11/2/09](#)]

**Erwin Chemerinski: The Supreme Court Has Held Congress Can Regulate Activities That Have Substantial Effect On Interstate Commerce.** "Congress clearly could do this under its power pursuant to Article I, Section 8 of the Constitution to regulate commerce among the states. The Supreme Court has held that this includes authority to regulate activities that have a substantial effect on interstate commerce. In the area of economic activities, "substantial effect" can be found based on the cumulative impact of the activity across the country. For example, a few years ago, the Supreme Court held that Congress could use its commerce clause authority to prohibit individuals from cultivating and possessing small amounts of marijuana for personal medicinal use because marijuana is bought and sold in interstate commerce." [Chemerinski, Politico, [10/23/09](#)]

**Erwin Chemerinski: Court Has Said Congress Can Use Its Commerce Power To Ban Hotels From Discriminating Based On Race, Even Though Conduct Was Refusing To Engage In Activity.** "Quite the contrary: The court has said that Congress can use its commerce power to forbid hotels and restaurants from discriminating based on race, even though their conduct was refusing to engage in commercial activity. Likewise, the court has said that Congress can regulate the growing of marijuana for personal medicinal use, even if the person being punished never engaged in any commercial activity." [Chemerinski, Politico, [10/23/09](#)]

**Erwin Chemerinski: Congressional Authority For Individual Mandate Similar To Social Security Taxes.** "Congress also could justify this as an exercise of its taxing and spending power. Congress can require the purchase of health insurance and then tax those who do not do so in order to pay their costs to the system. This is similar to Social Security taxes, which everyone pays to cover the costs of the Social Security system. Since the 1930s, the Supreme Court has accorded Congress broad powers to tax and spend for the general welfare and has left it to Congress to determine this." [Chemerinski, Politico, [10/23/09](#)]

**Laurence Tribe: The Individual Mandate Is 'The Mirror Image Of Lopez As A Commerce Clause Case.'** "In *United States v. Lopez*, the court found that the Gun-Free School Zones Act 'is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.' The individual mandate is 'the mirror image of *Lopez* as a Commerce Clause case,' says Harvard Law School professor Laurence Tribe." [Ruth Marcus, Washington Post, [11/25/09](#)]

**Yale Law School Constitutional Scholar: 'The Supreme Court Will Almost Certainly Uphold The [Individual Mandate]...To Strike Down The Individual Mandate, It Would Have To Reject Decades Of Precedents. It Is Very Unlikely [That The Court Would Stage] Such A Constitutional Revolution.'** Jack M. Balkin, J.D., Ph.D., Knight Professor of Constitutional Law and the First Amendment of the Yale Law School wrote in the *New England Journal of Medicine*: "The individual mandate taxes people who do not buy health insurance. Critics charge that these people are not engaged in any activity that Congress might regulate; they are simply doing nothing. This is not the case. Such people actually self-insure through various means...Moreover, like people who substitute homegrown marijuana or wheat for purchased crops, the cumulative effect of uninsured people's behavior undermines Congress's regulation — in this case, its regulation of health insurance markets. Because Congress believes that national health care reform won't succeed unless these people are brought into national risk pools, it can regulate their activities in order to make its general regulation of health insurance effective. One final argument against the individual mandate is that it violates the Fifth Amendment by allowing the government to take property without just compensation. 'Takings' occur when the government seizes property from particular individuals...The individual mandate is just such a tax — not a taking. Although opponents will challenge the individual mandate in court, constitutional challenges are unlikely to succeed. The Supreme Court will probably not even consider the issue unless a federal court of appeals strikes the tax down. In that unlikely event, the Supreme Court will almost certainly uphold the tax, at least if it follows existing law. To strike down the individual mandate, it

would have to reject decades of precedents. It is very unlikely that there are five votes on the current Court for staging such a constitutional revolution.” [New England Journal of Medicine, [1/14/10](#)]

**Stuart Taylor: Most Experts Agree That The Individual Mandate Is Constitutional.** “A healthy 20-something might ask: Can the government really order me to spend more than \$5,500 a year to buy comprehensive health insurance just because I live in the United States, even though the most I might need or want is catastrophic coverage costing less than \$800? Can they really force me to pay a big penalty ‘tax’ if I won’t buy government-approved insurance? And can they use my money to subsidize people who are twice my age, and obese or sick, even if they have more money than I do? The answers are yes, yes, and that’s the point! according to most of the experts who have weighed in on whether the Supreme Court would uphold a mandate for individuals to buy comprehensive health insurance unless they’re already covered by employer-based plans. They cite the justices’ very broad reading since the New Deal of Congress’s powers to regulate interstate commerce and to tax and spend.” [Stuart Taylor, National Journal, [12/12/09](#)]

**Prof. Schwinn Of U. Chicago: 'Whatever The Merits Of The Policy Arguments Against An Individual Mandate, These Commerce Clause Arguments...Do Not Render Them Unconstitutional.'** Steven D. Schwinn, Associate Professor of Law at the University of Chicago Law School examined claims that health reform and in particular individual mandates would be unconstitutional: “Whatever the merits of the policy arguments against an individual mandate, these Commerce Clause arguments based on ‘state sovereignty’ and lack of economic activity do not render them unconstitutional.” [Constitutional Law Prof. Blog, [12/4/09](#)]

**Prof. Mark Hall: Unconstitutional Argument 'Is Unconvincing And Deeply Flawed...There Is No Fundamental Right To Be Uninsured, And So Various Arguments Based On The Bill Of Rights Fall Flat.'** Mark A. Hall wrote on the Seton Hall University School of Law, Health Law & Policy Program blog: “Is it unconstitutional to mandate health insurance? It seems unprecedented to require citizens to purchase insurance simply because they live in the U.S. (rather than as a condition of driving a car or owning a business, for instance). Therefore, several credentialed, conservative lawyers think that compulsory health insurance is unconstitutional. See [here](#) and [here](#) and [here](#). Their reasoning is unconvincing and deeply flawed...Under both liberal and conservative jurisprudence, the Constitution protects individual autonomy strongly only when ‘fundamental rights’ are involved. There may be fundamental rights to decide about medical treatments, but having insurance does not require anyone to undergo treatment. It only requires them to have a means to pay for any treatment they might choose to receive. The liberty in question is purely economic and has none of the strong elements of personal or bodily integrity that invoke Constitutional protection. In short, there is no fundamental right to be uninsured, and so various arguments based on the Bill of Rights fall flat.” [Seton Hall University School of Law, Health Law & Policy Program, [8/25/09](#)]

**Prof. Hall’s Georgetown University Paper: 'The Constitution Permits Congress To Legislate A Health Insurance Mandate.'** Prof. Mark Hall concluded in his paper published by the Georgetown University O’Neill Institute for National and Global Health Law: “The Constitution permits Congress to legislate a health insurance mandate. Congress can use its Commerce Clause power or its taxing and spending powers to create such a mandate. Congress can impose a tax on those that do not purchase insurance, or provide tax benefits to those that do purchase insurance.” [Georgetown University paper: The Constitutionality of Mandates to Purchase Health Insurance, [February, 2009](#)]

**Prof. Dorf: No Different Than Federal Mandate To Compel Citizens To Jury Duty, No Different From States Imposing An 'Affirmative Obligation' On Parents To Educate Their Children.** “The CBO memo claims, then, that an individual mandate would be unique because it would impose an affirmative obligation on persons. Most laws either forbid some form of conduct (say, bank robbery) or impose restrictions as conditions on activities that the government could forbid altogether (say, by requiring that companies that are engaged in various lines of business comply with environmental laws, or that professionals pass licensing examinations). As the CBO memo states: ‘Federal mandates that apply to individuals as members of society are extremely rare.’ The only one that the CBO staff could think of was the requirement that draft-age men

register with the Selective Service System...To begin, the CBO memo's authors apparently forgot about jury duty. A federal statute that was already in effect in 1994 provides that 'all citizens shall have . . . an obligation to serve as jurors when summoned for that purpose.' ...Consider that every state imposes an affirmative obligation on parents to educate their children--whether in public school, private school, or via home schooling. Surely this obligation cannot be said to be a mere condition on the privilege of raising children, for the state has no authority to prevent people from becoming parents." [FindLaw, [10/21/09](#)]

**Prof. Dorf Of Cornell University Law School: 'The Individual Mandate Is...Constitutional.'** Professor Michael Dorf of the Cornell University Law School wrote: "the individual mandate is 'plainly adapted' to the undoubtedly legitimate end of regulating the enormous and enormously important health-care sector of the national economy. It is therefore constitutional." [FindLaw, [11/2/09](#)]

**Prof. Shapiro: 'Whatever One Thinks Of The Wisdom Of The Individual Mandate...It Would Be Surprising If The Constitution Prohibited A Democratic Resolution Of The Issue. Happily, It Does Not.'** Sen. Max Baucus noted that: "Robert Shapiro, Professor of Law at Emory University School of Law, stated: 'Whatever one thinks of the wisdom of the individual mandate, or of health care reform generally, it would be surprising if the Constitution prohibited a democratic resolution of the issue. Happily, it does not.'" [Statement by Sen. Baucus, [12/22/09](#)]

**Constitutional Law Prof. Schwinn: 'An Individual Mandate Is Almost Certainly The Kind Of Economic Activity That The [Supreme] Court Would Uphold Under Congress's Commerce Clause Authority.'** Prof. Steven D. Schwinn of the University of Chicago Law School critiqued an opinion piece in the Wall Street Journal by David Rivkin and Lee Casey arguing that the individual mandate provision was unconstitutional: "The authors are wrong on two counts. First, an individual mandate is almost certainly the kind of economic activity that the Court would uphold under Congress's Commerce Clause authority under *Raich*, *Lopez*, and *United States v. Morrison*. These cases allow Congress to regulate activities that have a "substantial effect" on interstate commerce, and they look to the commercial nature of the activity and to the connection between the activity and interstate commerce (among other considerations). An individual mandate is almost surely commercial in nature--in requiring folks to buy health insurance, it requires a commercial exchange. Rivkin and Casey argue that the mandate is not commercial in nature, because it's triggered simply by 'being an American.' This may be true, but it misses the point of the regulation: It requires Americans to engage in a commercial exchange. This is the definition of commerce...The Supreme Court may be on a path to limiting congressional authority under the Commerce Clause, the Taxing Clause, or any clause. But even so, the individual mandate all too squarely falls within the recent and settled jurisprudence." [Constitutional Law Prof. Blog, [9/25/09](#)]

**Prof. Mark Hall: There Are No Plausible Tenth Amendment Or States' Rights Issues Arising From the Imposition By Congress Of An Individual Responsibility To Maintain Health Coverage."** Sen. Baucus said in a statement: "I refer my colleagues to an article by Mark Hall, law professor at Wake Forest University. Professor Hall's article is a comprehensive, peer-reviewed analysis of the constitutionality of a Federal individual responsibility requirement. In it, Professor Hall concludes that there are no plausible Tenth Amendment or States' rights issues arising from the imposition by Congress of an individual responsibility to maintain health coverage. Professor Hall notes further that health care and health insurance both affect and are distributed through interstate commerce. And that gives Congress the power to legislate a coverage requirement using its Commerce Clause powers. Professor Hall notes that the Supreme Court indicated in its decisions in *United States v. Morrison* and *United States v. Lopez* - two other cases relied on by the other side - that the non-economic, criminal nature of the conduct in those cases was central to the court's decisions in those cases that the Government had not appropriately exercised power under the Commerce Clause. Health insurance, on the other hand, does not deal with criminal conduct." Prof. Mark Hall wrote, "[p]erusing some of [the Senate health reform bill's] 2000 pages, I came across the following, SEC. 1501 (p. 320), which should put to rest any argument that an individual mandate exceeds Congress' powers under the Commerce Clause." [Statement by Sen. Baucus, [12/22/09](#); O'Neill Institute for National and Global Health Law, [11/24/09](#)]